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Supreme Court of the United States

OCTOBER TERM, 1956

No. 280

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, APPELLANT,

vs.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

FILED JULY 24, 1956

PROBABLE JURISDICTION NOTED OCTOBER 8, 1956

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Case No. 20-RC-2478

In the Matter of P. S. Guss, d/b/a Photo-Sound Products Manufacturing Company, Employer

and

United Steelworkers of America, CIO, Petitioner

Certification of Representatives—May 4, 1954

Pursuant to the terms and provisions of the Agreement for Consent Election entered into by and between the parties in the above-entitled matter, the undersigned Regional Director of the National Labor Relations Board conducted an election by secret ballot as therein provided. No objections were filed to the Tally of Ballots furnished to the parties, or to the conduct of the election.

Pursuant to authority vested in the undersigned by the Agreement for Consent Election and by the National Labor Relations Board, it is hereby certified that a majority of the valid ballots has been cast for United Steelworkers of America, CIO and that pursuant to Section 9 (a) of the National Labor Relations Act said organization is the exclusive representative of all the employees in the unit defined in the Agreement for Consent Election for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at San Francisco, California on the 4th day of May, 1954.

On behalf of National Labor Relations Board, (S.) Gerald A. Brown, Regional Director for 20th Region National Labor Relations Board.

[fol. 2] BEFORE THE NATIONAL LABOR RELATIONS BOARD.

CHARGE AGAINST EMPLOYER—Filed May 17, 1954
Case No. 20-CA-977

Date filed 5-17-54.

Compliance Status Checked By: el.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constitutent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring

1. Employer Against Whom Charge Is Brought

Name of Employer: P. S. Guss, d/b/a Photo Sound Products Manufacturing Company.

Address of Establishment (Street and number, city, zone, and State): 262-264 East 1st South, Salt Lake City, Utah.

Number of Workers Employed: 20-30.

Nature of Employer's Business: Steel Fabricating.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

(1) Said Company by its actions in threatening to close the plant if employees joined or voted for the Union has interfered with and coerced its employees, in the exercise of their rights guaranteed by the Act.

(3) Said Company by the discharge of Harry W. Shupe on 3-8-54 and by the discharge of others of their employees on various dates before and since 3-8-54 has engaged in discrimination in regard to tenure of employment in order to discourage membership in the Union.

(5) By its refusal to bargain collectively and by completely ignoring the Unions efforts to establish barggaining since Union was certified 5-4-54.

By such acts and other acts the Company has engaged in and is now engaging in unfair labor practices within the meaning of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: United Steelworkers of America, CIO.

4. Address (Street and number, city, zone, and State): 25 East 2nd South, 1 Salt Lake City, Utah, Telephone No. 3-4543.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constitutent Unit (To be filled in when charge is filed by a labor organization): United Steelworkers of America, CIO.

6. Address of National or International, if any (Street and number, city, zone, and State): 1500 Commonwealth Building, Pittsburgh, Pa., Telephone No. Grant 1-5254.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By —— ——, (Signature of representative of person filing charge), —— ——, Representative.

May 14, 1954.

[fol. 3] BEFORE THE NATIONAL LABOR RELATIONS BOARD

National Labor Relations Board
Twentieth Region
630 Sansome St.
San Francisco 11, California

July 21, 1954

United Steelworkers of America, C.I.O.
25 East 2nd South
Salt Lake City, Utah

Re: P. S. Guss, d-b-a Photo Sound
Manufacturing Company
Case No. 20-CA-977

Gentlemen:

The above captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

Further proceedings are not warranted, inasmuch as the operations of the Company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of the receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours, /s/ Roy O. Hoffman, Roy O. Hoffman, Acting Regional Director.

cc: Division of Operations, NLRB, Washington 25, D. C.
P.S. Guss, d/b/a Photo Sound Products Manufacturing

Company 262-264 East 1st South, Salt Lake City, Utah.
Peter W. Billings, Attorney-at-law, Continental Bank Bldg., Salt Lake City, Utah.

Registered-Return Receipt Requested.

[fol. 4] BEFORE THE UTAH LABOR RELATIONS BOARD

STATE CAPITOL, SALT LAKE CITY, UTAH

Case No. U-863

IN THE MATTER OF PHOTO SOUND PRODUCTS MFG. COMPANY, 262-264 East 1st South, Salt Lake City, Utah and UNITED STEELWORKERS OF AMERICA, CIO.

CHARGE—Filed July 30, 1954

Pursuant to Chapter 1, Title 34, Utah Code 1953, Section 34-1-8 of the Utah Labor Relations Act, the undersigned hereby charges that Photo Sound Products Manufacturing Company has engaged in and is engaging in unfair labor practices within the meaning of Section 34-1-8 subsections (a) and (c), (d) and (e) of said Act, in that

(a) Said employer has since November, 1953 interfered with, restrained and coerced its employees in the exercise of their rights by a number of statements regarding the dire effects which would result to employees if the Union got in the plant including official statements that plant would close down in the event the Union won the NLRB Election.

(c) Said employer by the discharge of Harry W. Shupe, Victor Sismondi, Gary Watrous, Max Whitman, Clisbee H. Lyman and others of its employees on various dates since November, 1953 has engaged in discrimination with regard to tenure of employment in order to discourage membership in the Union.

(d) Said employer by its refusal to bargain collectively with the Union, since Union was certified as the proper agent for collective bargaining purposes by NLRB on 5-4-54.

(e) Said employer by its acts in granting individual wage

increases and other concessions to employees has since 5-4-54 bargain with less than a majority of its employees while at the same time refusing to bargain collectively with the majority of its employees under the provisions of subsection (d) of this Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting intrastate commerce and the orderly operation of industry within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

Subscribed and sworn to before me this 29 day of July 1954, Ormond Konkle.

United Steelworkers of America, CIO, Ralph N. Rasmusson, Representative, 224 Beason Building, Salt Lake City, Utah.

[fol. 5]

STATE OF UTAH

BEFORE THE UTAH LABOR RELATIONS BOARD

[Title omitted]

Case No. U-863

COMPLAINT

The Utah Labor Relations Board having before it a Charge filed July 30, 1954, by the United Steelworkers of America, (CIO) and having advantage of the Board's Investigation of said Charge, the Board under the authority of Title 34, Chapter 1, Section 10, issues this, its complaint and alleges:

1. The United Steelworkers of Amercia (CIO), hereinafter referred to as Complainant, is a labor organization within the meaning of Section 34-1-2, Subsection 5, U.C.A., 1953, and admits to membership employees of Respondent.

2. The Photo Sound Products Mfg. Company, hereinafter referred to as Respondent, is an employer within

the meaning of Section 34-1-2, Subsection 2, U.C.A., 1953.

3. The respondent is a corporation existing under the laws of the State of Utah and is engaged primarily in activities affecting commerce within the State of Utah.

4. The management of the respondent has engaged in activities which tend to interfere with the rights of its employees guaranteed by Section 34-1-7, U.C.A., 1953.

5. The management of respondent has discriminated in regard to tenure of employment or conditions of employment to discourage membership in complainant of Harry W. Shupe, Victor Sismondi, Gary Watrous, Max Whitman, Clisbee H. Lyman and others not known to the board.

6. The respondent has refused to bargain collectively with the complainant since June 23, 1954, and continues to refuse to bargain collectively with complainant who are and have been ever since May 4, 1954 the duly certified bargaining agent of the employees of the Respondent.

[fol. 6] 7. The respondent has through unilateral wage increases bargained collectively with representatives of less than a majority of its employees.

8. The activities of respondent in paragraphs 5, 6 and 7 above all being contrary to and in violation of the spirit and meaning of the Utah Labor Relations Act and more specifically Sections 34-1-8, Subsections 1(a), (c), (d), and (e).

All of the foregoing activities by the respondent being in violation of the Utah Labor Relations Act, such activities tend to affect interstate commerce or the orderly operation of industry within the State of Utah.

Wherefore, the Utah Labor Relations Board being fully advised issues this its Complaint and attaches hereto its Notice of Hearing.

Utah Labor Relations Board, Otto A. Stanley, Chairman, C. S. Carroll, Commissioner, A. E. Taylor, Commissioner.

Passed by the Utah Labor Relations Board, Salt Lake City, Utah, January 14, 1955.

(S) Gloria B. Hanni, Commission Secretary.

[fol. 7] BEFORE THE UTAH LABOR RELATIONS BOARD

EXERPTS FROM TRANSCRIPT OF TESTIMONY

COLLOQUY

The Referee: The hearing will be in order.

This is the time and place set for the hearing of Case No. U-863, Photo Sound Products Manufacturing Company, respondent, and the United Steelworkers of America, CIO, complainant.

The record will show that the complainant, United Steelworkers of America, is present and is represented by counsel, A. Wally Sandack, and the respondent, Photo Sound Products Manufacturing Company is present and represented by counsel, Peter W. Billings.

The title to the case will be amended to state the proper name of the respondent, the proper name being, Philip S. Guss, doing business as Photo Sound Products Manufacturing Company, a Sole Proprietorship.

Off the record.

(Discussion off the record).

STATEMENT OF MR. BILLINGS ON BEHALF OF PHOTO SOUND, ETC.

Mr. Billings: Mr. Guss and his business known as Photo Sound Products Manufacturing Company is in the netherland of jurisdiction. The National Labor Relations Board originally exercised jurisdiction, and then after it changed its rules as to the test to be applied as to whether or not it should exercise jurisdiction, it dismissed jurisdiction in this matter. Now his business is performing contracts for the Defense Department, and I don't think it is intrastate commerce, but it is not such a substantial part of interstate commerce, or has such a substantial effect upon the national defense, within the tests recently adopted by the National

Labor Relations Board, that they felt they should not exercise jurisdiction and they so dismissed the matter.
[fol. 7a] It is our position that this Commission does not have jurisdiction and that it is the jurisdiction of the National Labor Relations Board, which it has decided not to exercise.

STATEMENT OF MR. SANDACK ON BEHALF OF UNITED STEELWORKERS, ETC.

Mr. Sandack: For the record, it is the position of the complainant union that the National Labor Relations Board, in finding as it did on July 21, 1954, "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the Act,"—meaning the National Labor Relations Act—" to exercise jurisdiction. I am, therefore, refusing to issue complaint in this matter." It is the position of the complainant union that Mr. Guss's operation is subject to intrastate commerce.

I also wish to point out for the record that a copy of that letter, which Mr. Billings on behalf of his client, Mr. Guss, received, that letter provided that if there was to be any question upon which either party who received that letter might desire to appeal from that ruling, that a request should be filed within ten days from receipt of the letter so that the General Counsel could determine whether or not the Acting Regional Director was proper in declining to accept this matter.

I think the record should state that neither the complainant or respondent filed any appeal procedure from that ruling, and both accepted it as Board policy, and that was it. Isn't that right, Mr. Billings?

Mr. Billings: We certainly did not appeal for the very position I state herein. This is in the area which the Board has jurisdiction but has refused to exercise it, because of matters of policy.
[fol. 8] Mr. Sandack: You certainly did not appeal from this ruling, that the Board declined to assert jurisdiction.

Mr. Billings: That is right.

Mr. Sandack: Now, Mr. Hearing Officer, it is the union's position that there just cannot be a situation where nobody

has jurisdiction, or where the State, in exercising its rights under statutory labor law would decline to assume jurisdiction over the area that is effected by intrastate commerce. We have created a great hocus-pocus legal vacuum that would have no meaning at all in the field of labor relations which is a dynamic and fluid situation, but requires constant supervision.

The Referee: Off the record.

(Discussion off the record.)

OFFERS IN EVIDENCE AND OBJECTION THERETO

The Referee: The Board will receive as evidence certain documents, the first of which will be marked, "Complainant's Exhibit No. 1," which is a document entitled, "Petition," on a form prescribed by the National Labor Relations Board, dated 12-1-53. Complainant's Exhibit No. 2 is a "Tally of Ballots," dated April 26, 1954.

Mr. Sandack: Mr. Hearing Officer, I think in chronological order next would be the Consent Election.

The Referee: That is right. I have got these out of order. Complainant's Exhibit 3, which is entitled, "Agreement for Consent Election," on a form prescribed by the National Labor Relations Board, is dated January 19, 1954. Then Complainant's Exhibit No. 2, which is a "Tally of Ballots," on a form prescribed by the National Labor Relations Board, dated April 26, 1954. Complainant's Exhibit No. 4, which is a "Certification of Representatives," on a form prescribed by the National Labor Relations Board, is dated [fol. 9] the 4th day of May of 1954, and a letter marked, "Complainant's Exhibit No. 5," is addressed to the United Steelworkers of America, C.I.O., and signed by Roy O. Hoffman, Acting Regional Director.

Mr. Sandack: Mr. Commissioner, there should be attached to the Petition for Certification this designation of employees that the Union claimed were representatives at the time, and that the Board required in connection with the original petition, so make that part of the first exhibit.

The Referee: It will be attached to and made a part of Complainant's Exhibit No. 1.

(The documents referred to were marked, "Complainant's Exhibits Nos. 1 to 5," inclusive, for identification.)

Mr. Billings: I haven't seen that roll. Do I have a copy of it?

The Referee: That is a part of it.

Mr. Sandack: I believe the company supplied it. This was supplied by the company to the Board in connection with a certification and consent proceeding.

Mr. Billings: That is part of the Petition.

May my objection go to these documents, and all other proceedings in this matter, on the basis that is beyond and without the scope of this Commission, on the basis of the facts stated in all the exhibits?

The Referee: The objection will be noted, and the ruling will be reserved. The exhibits will be received in evidence.

(The documents previously marked, "Complainant's Exhibits Nos. 1 to 5, inclusive, for identification, were received in evidence.)

[fol. 10] Excerpts from Testimony of Philip S. Guss

Q. What was the business, the principal business that Photo Sound Equipment Company was engaged in during the period of October, 1953, to October, 1954?

A. Manufacturing photographic equipment for the Air Force.

Q. Was that your only work?

A. The only work with the exception of some work we did for Inter-Mountain in the same shop.

[fol. 11] By Mr. Billings:

Q. Just one or two questions, Mr. Guss. There are three.

A. Yes.

Q. One for the chemical mixers, one for the print straighteners?

A. Yes.

Q. That is all three are for the Air Force and they are shipped to Wright-Patterson Field?

A. With the exception of the chemical mixers, were shipped to Mobile, Alabama; Hill Field here. But some later products have got to be shipped to the Signal Corps.

Q. All the products you manufacture will be shipped outside the State of Utah?

A. Yes, with the exception of what goes to Hill Field. They haven't given us shipping instructions as yet.

Q. And most of the materials you use for the fabrication of these items come from outside the State of Utah?

A. The bulk of it. You can't buy it in Salt Lake. It is all special material the Air Force demanded, and you can't buy it in Salt Lake.

Q. Now you have cut down to this twelve or fourteen men because that is all the work you have to do in your shop at Photo Sound, is that correct?

A. That is correct. We try——Even now we are running low in work. We have to switch the amount of work to help them out rather than let them go.

Mr. Billings: I believe that is all.

By Mr. Sandack:

Q. One or two questions. What is the total amount of the contract between your company and the Air Force for all three of these things?

A. Well, as near as I can remember it would be approxi- [fol. 12] mately $86,000.00, the one for the mixers, and the two other contracts are approximately $60,000.00 total.

Mr. Billings: I can give you the exact amount.

Mr. Sandack: If you would.

Mr. Billings: Surely. The contract for the mixers is $84,896.73; the one for the printers is $37,222.42; and the print straightener is $29,906.35.

By Mr. Sandack:

Q. Now, let me ask you this question. Is the payment on this contract dependent upon your total completion; or payments made under the contract when you ship certain quantities of the gear; or how do you get paid under your contract?

A. It is paid when it is completed.

Q. You haven't been paid at all?

A. We have got paid for one contract, the mixer.

Q. Been paid on the mixer?

A. Yes. The spare parts, we haven't been paid yet.

Q. The $37,000, and the $29,000 are unpaid?
A. That is correct.
Q. Who is the $37,000 and the $29,000 contract with?
A. The same; the Air Force.

[fol. 13] The Referee:

Q. Just one question, Mr. Guss. What was the approximate value of the merchandise that you purchased to complete the contracts with the Air Force that was obtained from without the State of Utah?
A. Well, I can guess. I can give you exactly in the office.
Mr. Billings: I have the figure we gave the N.L.R.B.
The Witness: The valuation of our labor was the biggest item.
The Referee: You can show it to him.
Mr. Billings: Off the record.
(Discussion off the record.)
The witness: I would say between forty-five and fifty thousand dollars.

By the Referee:

[fol. 14] Q. All of those purchases originated outside the State of Utah?
A. If I may say this statement here, we have had so much spoilage. You see the threads for this particular contract was so close, and that has been our biggest problem. We had so much trouble. We couldn't produce a product to satisfy the inspector. We had an inspector right in our plant. As a result we had to buy more material. A lot of it was waste.
Q. The gross amount?
A. I would say it was a little under $50,000.00. I can get the exact amount in our office.
Q. That was mostly steel?
A. Stainless steel.
Q. Do you know where it came from?
A. Yes, sir.
Q. Whereabouts?
A. Mostly from Portland; some from Chicago; some from New York; some from the Coast, to Los Angeles.

[fol. 15] Afternoon Session

February 9, 1955, 2:00 o'clock, p.m.

The Referee: The hearing will be in order.

You have concluded your case, Mr. Sandack?

Mr. Sandack: The record may show that the Union rests.

RENEWAL OF MOTION TO DISMISS

Mr. Billings: At this time I would like to renew my motion to dismiss this proceeding on the ground that the evidence adduced by the complaining union indicates that Mr. Guss's enterprise is engaged solely in interstate commerce and manufactures supplies for the United States Air Force and the major part of its raw materials is imported from outside the State of Utah and on that basis not a [fol. 16] matter within the jurisdiction of this Board.

The Referee: The motion will be taken under advisement and ruled on at a future date.

Now, is it your intention to proceed, Mr. Billings, with an affirmative defense?

Mr. Billings: Yes.

The Referee: But in no way waiving any of your rights under your motion to dismiss?

Mr. Billings: That is correct.

The Referee: You may proceed.

[fol. 17] Mr. Sandack: I don't suppose you want any argument on this matter?

The Referee: The only thing I would like to have is Mr. Billings' memorandum in support of his argument on jurisdiction.

[fol. 18] STATE OF UTAH

Before THE UTAH LABOR RELATIONS BOARD

[Title omitted]

Case No. U-863

INTERMEDIATE REPORT—May 25, 1955

Pursuant to a Complaint and Notice of Hearing of the Utah Labor Relations Board, the above entitled matter came

regularly on for Hearing on February 7th and 9th, 1955, before Robert J. Shaughnessy, the Board's duly designated Trial Examiner.

The Petitioner was present and represented by Counsel, A. Wally Sandack, and the Respondent was present and represented by Counsel, Peter W. Billings, Attorney.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues.

Following the close of the Hearing, both parties were permitted to file Briefs which have been received and considered by the Trial Examiner.

History of the Case—Jurisdiction

The Respondent, Phillip S. Guss, dba Photo Sound Manufacturing Company, is engaged in the manufacture of specialized equipment for the United States Air Force on a contract basis. The amount of these contracts with the Government or its agencies totaled $152,025.50.

On December 1, 1953, the Petitioner herein filed a Petition (Bd. Exhibit #1) for Certification of representatives with the National Labor Relations Board involving the employees of the Respondent. Pursuant to this Petition, an Agreement for consent election (Bd. Exhibit #3) was signed, an Election conducted on April 26, 1954, a Tally of [fol. 19] Ballots issued April 26, 1954 and a Certification of Representatives dated May 4, 1954. All of the foregoing was handled by and through the National Labor Relations Board, 20th Region.

After a series of attempts at negotiating a contract by the Petitioner and Respondent, an Unfair Labor Practice Charge (Resp. Exhibit #7) was filed against the Respondent by the Petitioner on May 17, 1954. Following the filing of this Charge, the Acting Regional Director of the 20th Region of the N.L.R.B. issued a letter (Comp. Exhibit #9) dated July 21, 1954 in which he declared, "Further proceedings are not warranted, inasmuch as the operations of the Company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction. I am, therefore, refusing to issue complaint in this matter." No appeal or other

proceedings were taken thereafter by either party and the decision became final.

Following this decision, the Petitioner filed charges with the Utah Labor Relations Board alleging in substance the same matters as filed before the N.L.R.B. The Petitioner's position is that the refusal of the N.L.R.B. to act confers jurisdiction on this Board to act. The Respondent's position is that the employer is in fact engaged in interstate commerce, subject to the N.L.R.B. and by Federal preemption in this field the Utah Labor Relations Board cannot act.

It must be conceded that the Respondent is manufacturing products almost all of which are shipped outside the State of Utah. It is also true that a large amount of the dollars expended in performing these contracts are spent for labor and the purchase of materials on a local level. It is thus apparent that intrastate commerce as well as interstate commerce is affected by this dispute.

It is important that consideration must be given to the fact that in the original representation proceeding the Certification was issued on the basis of a "Consent Election." In this proceeding there was no administrative or judicial determination by the N.L.R.B. or its agents that the Respondent's operation was sufficient to warrant the N.L.R.B. to assume jurisdiction. The parties merely agreed that they were subject to the National Labor Relations Act.

[fols. 20-24] Pursuant to the filing of the Unfair Labor Practice Charge by the Complainant before the N.L.R.B., the first expression of administrative determination of the question of jurisdiction occurred when the Regional Director of the N.L.R.B. stated . . . "the operations of the Company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the act to exercise jurisdiction." It appears that here we have an expression by a lack of jurisdiction on the part of the N.L.R.B. and such expression became final when no appeal was taken. The N.L.R.B. and the parties to this proceeding apparently agree that the activities of the Respondent are primarily local in character. The Hearing Referee must agree.

As was stated by our Supreme Court in Utah Labor Relations Board vs. Utah Valley Hospital, 235 Pac. 2d 520;

"It would seem paradoxical indeed to hold as defendant urges us to do, that the hospital is beyond the control of the Utah Legislature because it is controlled by an Act of Congress, which by its very terms excludes the hospital from its operation."

As was aptly pointed out by the New York State Labor Relations Board in a somewhat similar situation in the case of Matter of B.P.O.E. of the United States vs. N.Y.S.L.R.B., 17 S.L.R.B. 61:

"Exclusion of organizations such as Respondents from the coverage of the Act: "... would not immunize them from labor disputes, for it would not deprive the employees of the right to join a union or to engage in concerted activities. The sole effect would be to make unavailable the procedures for peaceful adjustments of labor disputes, which the Legislature has provided in the Act, and regulate the employees to economic action to obtain recognition and negotiations. The purpose of the Act is to substitute the peaceful procedures provided therein for the economic warfare which results from the refusal of employers engaged in commercial activities to negotiate with the representatives of their employees.' "

The Hearing Examiner must, therefore, conclude that the business of the Respondent affects intrastate commerce, or the orderly operation of industry within the State of Utah, and since the N.L.R.B. has refused jurisdiction, therefore the Utah Labor Relations Board has jurisdiction.

[fol. 25] FINDING OF FACT

1. The Petitioner, United Steelworkers of America, is a labor organization within the meaning of the Utah Labor Relations Act and admits to membership employees of the Respondent.

2. The Respondent, Phil S. Guss, dba Photo Sound Products Mfg. Co., is a sole proprietorship engaged in the manufacture of equipment to be sold to the United States Air Force.

[fols. 26-27] 3. The Respondent's contract with the United States Air Force totals approximately $152,000.00, a part

of such sum represents materials purchased locally and a substantial part represents payments for labor to local employees.

4. The Respondent's activities affect intrastate commerce or the orderly operation of industry within the State of Utah.

5. The Petitioner has since May 4, 1954 represented a majority of the employees of the Respondent in an appropriate bargaining unit as certified by the National Labor Relations Board following a Consent Election on April 26, 1954.

[fols. 28-30] Utah Labor Relations Board, Robt. J. Shaughnessy, Trial Examiner.

Issued this 25th Day of May, 1955, Salt Lake City, Utah.

[fol. 31] STATE OF UTAH

BEFORE THE UTAH LABOR RELATIONS BOARD

Case No. U-863

IN THE MATTER OF PHOTO SOUND PRODUCTS MFG. COMPANY, Respondent, and UNITED STEELWORKERS OF AMERICA, CIO, Complainant.

DECISION AND ORDER—June 21, 1955

The Utah Labor Relations Board has considered the Intermediate Report and Recommended Order of Robert J. Shaughnessy, the Board's duly designated Trial Examiner, in the above entitled cause, together with the transcript, exhibits, briefs and exceptions to the Intermediate Report.

The Board finds the Trial Examiner's rulings made at the Hearing are free from prejudicial error and are hereby affirmed.

Upon consideration of the entire record, the briefs, and the exceptions, the Board adheres to the Intermediate Re-

port and Recommended Order made by the Trial Examiner and adopts as its own the Findings of Fact therein made. The Board therefore finds as follows:

1. The Petitioner, United Steelworkers of America, is a labor organization within the meaning of the Utah Labor Relations Act and admits to membership employees of the Respondent.

2. The Respondent, Phil S. Guss, d.b.a. Photo Sound Products Mfg. Company, is a sole proprietorship engaged in the manufacture of equipment to be sold to the United States Air Force.

3. The Respondent's contract with the United States Air Force totals approximately $152,000.00, a part of such sum represents materials purchased locally and a [fol. 32] substantial part represents payments for labor to local employees.

4. The Respondent's activities affect intrastate commerce or the orderly operation of industry within the State of Utah.

5. The Petitioner has since May 4, 1954 represented a majority of the employees of the Respondent in an appropriate bargaining unit as certified by the National Labor Relations Board following a Consent Election on April 26, 1954.

6. Charles Illsley was employed by the Respondent as a sheet metal worker and was discharged in August 1954 for activities for and on behalf of the Petitioner.

7. Gary Watrous was employed on July 15, 1954 and discharged on May 7, 1954 for activities for and on behalf of the Petitioner.

8. Harry Shupe was employed on October 9, 1953 and discharged on March 5, 1954 and such discharge was not for activities for and on behalf of the Petitioner.

9. Rudolf Wobbe was employed in October of 1953 and discharged in October of 1954 and such discharge appeared to be prompted by his activities for and on behalf of the Petitioner. However, this employee expressed no desire to return to his former employment.

10. Victor Sismondi was employed in October of 1953 and discharged in April of 1954 for activities for and on behalf of the Petitioner.

11. There is no competent evidence to support a finding that Clisboo Lyman was discharged for activities for and on behalf of the Petitioner and no evidence was introduced in regard to the discharge of Max Whitman.

12. The question of interference in the rights of the employees to organize is not in issue since the Petitioner has been duly designated as the collective bargaining representative of the employees.

13. The Respondent has at all times since August 11, 1954, failed and refused, and continues to fail and [fol. 33] refuse to meet, confer, discuss and negotiate in good faith with the Petitioner as the exclusive bargaining representative of the employees in the agreed appropriate unit for the purpose of collective bargaining in regards to rates of pay, hours of employment, and other conditions of employment, although requested to do so by the Petitioner.

It is therefore ordered that—

1. Phil S. Guss, d.b.a. Photo Sound Products Mfg. Company, cease and desist from refusing to bargain collectively with United Steelworkers of America as the exclusive bargaining representative of his employees employed at his place of business, 264 East 1st South, Salt Lake City, Utah, in respect to rates of pay, hours of employment and other conditions of employment.

2. Take the following affirmative action which the Board finds is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America as the exclusive bargaining representative of his employees employed by the Respondent at 264 East 1st South, Salt Lake City, Utah, in respect to rates of pay, hours of employment and other conditions of employment.

(b) Upon application, either personally or through their bargaining representative, immediately and fully reinstate Charles Illsley, Gary Watrous and Victor

Sismondi to their former positions with Respondent held by them prior to the dates of their discharge without prejudice to any rights or privileges previously enjoyed by each of them, discharging, if necessary, any person or persons employed in the place of each since their discharge.

(c) Make whole each of the employees named in paragraph (b) above for any loss of wages that may have occurred from the time of their discharge until they are fully reinstated. Employer to receive credit for all earnings from all sources during the time be-
[fol. 34] tween the date of their discharge and the time of their reinstatement.

(d) Post immediately, in plain sight, and leave posted for a period of thirty consecutive days from the first day of posting, in a conspicuous place in Respondent's premises, a copy of the Board's Order together with an appropriate notice to its employees in the form to be determined by the Board, (Exhibit A).

(e) Notify the Utah Labor Relations Board in writing within fifteen (15) days of the receipt of the Board's Order, what steps Respondent has taken to comply with the provisions of this Order.

Utah Labor Relations Board, (S.) Otto A. Wirsley, Chairman, (S.) C. S. Carroll, Member, (S.) L. L. Taylor, Member.

Passed by the Utah Labor Relations Board, Salt Lake City, Utah, June 21st, 1955.

(S.) Gloria B. Hanni, Commission Secretary.

[fol. 35] STATE OF UTAH

BEFORE THE UTAH LABOR RELATIONS BOARD

[Title omitted]

MOTION FOR RE-HEARING—Filed June 29, 1955

Comes Now Respondent, Photo Sound Products Mfg. Company, and respectfully moves the Utah Labor Rela-

tions Board to grant a re-hearing of the above entitled matter on the ground that the order of the Commission dated June 21, 1955, is in error in the following particulars:

1. The Board was without jurisdiction over the labor relations of Respondent Photo Sound Products Manufacturing Company in that respondent is engaged in a business affecting interstate commerce and its labor relations are within the exclusive jurisdiction of the National Labor Relations Board under the provisions of Section 10(a) of the National Labor Relations Act, as amended.

2. The Board's Findings of Fact with respect to Charles Illsley, Gary Watrous and Victor Sismondi are in error and not supported by the evidence.

3. The conclusions with respect to the alleged refusal to bargain are in error and not supported by the evidence.

Peter W. Billings, Attorney for Respondent.

Proof of service (omitted in printing).

[fol. 36] STATE OF UTAH

BEFORE THE UTAH LABOR RELATIONS BOARD

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—June 29, 1955

It is hereby ordered that a Motion for Re-Hearing filed by the Respondents, Photo Sound Products Mfg. Company on June 29th, 1955, be and the same is hereby denied.

Utah Labor Relations Board, /S/ Otto A. Wimley, Chairman, /S/ C. S. Carroll, Member, /S/ L. L. Taylor, Member.

Passed by the Utah Labor Relations Board, Salt Lake City, Utah, June 29th, 1955.

/S/ Gloria B. Hanni, Commission Secretary.

[fol. 37] IN THE SUPREME COURT OF THE STATE OF UTAH

Case No. 8393

PHILIP S. GUSS, dba PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, Petitioner

vs.

UTAH LABOR RELATIONS BOARD and UNITED STEELWORKERS OF AMERICA, CIO, Respondent

PETITION FOR WRIT OF REVIEW

Comes now Petitioner and respectfully represents:

1. That he is engaged in business in Salt Lake City under the name of Photo Sound Products Manufacturing Company; that said business is devoted exclusively to the manufacture of specialized photographic equipment for the U.S. Air Force and as such is engaged in interstate commerce or in a business affecting interstate commerce within the intent and meaning of the Labor Management Relations Act of 1947, as amended.

2. That contrary to the specific grant of exclusive power to the National Labor Relations Board under said Act the Utah Labor Relations Board has entertained a charge filed with it by the United Steelworkers of America, CIO, and issued a complaint thereon against Petitioner. That despite the contentions of Petitioner concerning the lack of jurisdiction of said Board, said Board under date of June 21, 1955 issued its decision and order relating to the labor relations of Petitioner and on June 29, 1955 denied Petitioner's motion for re-hearing. At all times herein Petitioner has contended said Board was wholly without authority or jurisdiction to act in the matter.

3. Further, the Board has made certain findings of fact and ordered certain affirmative action to be taken with respect to the employment of Charles Illsley, Gary Watrous and Victor Sismondi and has found that Petitioner has refused to bargain collectively with said United Steelworkers of America. Said findings and order are wholly unsup-

ported by the evidence duly introduced before the said Board.

[fol. 38] Wherefore, this Petitioner prays that this Honorable Court order the issuance of a Writ of Certiorari or Review directed to the Utah Labor Relations Board to certify its record, including all proceedings and evidence in this cause to this court at such time after the issuance of said writ as may please this court, to the end that this court shall set aside the order of said Board and direct the said Utah Labor Relations Board to dismiss its proceedings concerning the labor relations of Petitioner as beyond the jurisdiction of said Board or failing that, that this court modify the order of said board to eliminate any findings of discriminatory discharges or refusal to bargain.

Respectfully submitted, Peter W. Billings, Attorney for Applicant.

[fol. 39] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8393

P. S. Guss, d/b/a Photo Sound Products Manufacturing Company, Plaintiff,

v.

UTAH LABOR RELATIONS BOARD and UNITED STEELWORKERS OF AMERICA, CIO, Defendants

OPINION

McDONOUGH, Chief Justice:

The plaintiff, P. S. Guss, d/b/a Photo Sound Manufacturing Company, is engaged in the manufacture of specialized equipment for the United States Air Force on a contract basis. The amount of these contracts with the government or its agencies totaled $152,025.50, and materials were purchased outside the state in an amount "a little less than $50,000." The finished products were shipped to Air Force Bases both within the state and without.

In December, 1953, the United Steelworkers of America, CIO, filed with the National Labor Relations Board, a petition for certification of that union as the bargaining representative for employees of the company. The company and the union entered into an agreement for a consent election to be conducted by the N.L.R.B., the agreement reciting that the employer is "engaged in commerce within the meaning of Section 2(6)(7) [1] of the National Labor Relations Act." The election was won by the union and the United Steelworkers of America, CIO, was certified by the N.L.R.B.

The union filed charges of violations under Section 8 [2] of the National Labor Relations Act with the N.L.R.B., alleging unfair labor practices on the part of the employer. On July 21, 1954, the National Labor Relations Board declined to consider the charges of the union, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction."

Thereafter, the union filed substantially the same charges with the State Board, which, after a hearing on the charges, ordered Photo Sound to cease and desist from using to bargain collectively with the CIO and further directing that certain discharged employees be reinstated with compensation for the time for which they had been unemployed.

The employer obtained this Writ of Review for the purpose of questioning the jurisdiction of the Utah Labor Relations Board. The sole question before us is whether the state board may act in relation to a business admittedly engaged in interstate commerce and subject to the National Labor Relations Act and the National Labor Relations Board when that Board declines, upon the grounds stated, to exercise jurisdiction.

Apparently, the N.L.R.B. determined not to take jurisdiction of this matter on the basis of jurisdictional stand-

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[1] 29 U.S.C. § 152 (6) § (7).

[2] 29 U.S.C. § 158.

ards established by the Board, summarized in N.L.R.B. Press Release R-449, July 15, 1954. These standards, promulgated to relieve the federal agency of some of the weight of matters falling within its jurisdiction under the broad provisions of Section 3(6)(7) of the Act, select arbitrary lines determined by the nature of the business and its size. The difficulty here is that if the Utah Labor Board has no jurisdiction and the National Labor Board refuses to accept jurisdiction, the parties are left to their own devices in securing industrial harmony, although both the federal and local government have evidenced concern with labor relations in providing law and agencies to administer it.

Plaintiff cites to us language from many cases decided by the U. S. Supreme Court concerning whether or not Congress intended to pre-empt the entire field of labor-management relations within its power to do so under the commerce clause of the Constitution. But concedes that an instance of the refusal of the N.L.R.B. to take jurisdiction, as here, has never been litigated before that court.

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, (1947) involved the question of whether the state board could certify a foremen's union subject to the National Labor Relations Act where the national board had refused to certify that union as a matter of board policy. The court stated through Mr. Justice Jackson:

> ". . . If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, . . . its power to decide

whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

A similar result was reached in La Cross Telephone Corporation v. Wisconsin Employment Relations Board, 336 U.S. 18, 69 S. Ct. 379, 93 L.Ed. 463 (1948) and the Supreme Court further emphasized its view that a state's certification of a bargaining unit in the absence of N.L.R.B. action created conflict in the field of labor relations of groups in interstate commerce:

". . . We know that administrative practice also disposes of cases in which no order has been entered. Disposition of controversies on an administrative as distinguished from a formal basis will often reflect the attitudes of the National Board which have not been reduced to orders in those specific cases. A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. . . ."

On the basis of these two cases, the Court reversed a decision of the Wisconsin Supreme Court (255 Wis. 285, 38 N.W.2d 688) which held that the State Employment Relations Board had jurisdiction over a matter of *unfair labor practices* in the absence of a federal board ruling, Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953, 70 S. Ct. 491, 94 L. Ed. 588 (1950).

However, certain inroads have been made upon the doctrine of exclusiveness of the National Board's jurisdiction under the familiar principle the Congress may determine how far its regulation of interstate commerce shall go, and when it circumscribes its regulation, and occupies only a limited field, state regulation outside that limited field is not forbidden or displaced. Where the peace of the community is threatened by mass picketing, threats, property damage, and obstruction of streets, a state may act to enjoin such activities. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, (1942). Recurrent, unannounced work

stoppages are neither prohibited nor protected by the Taft-Hartley Act and hence a state may control that conduct. International Union v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S. Ct. 516, 93 L. Ed. 651, (1949). See also Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691, (1949). The Supreme Court has permitted an action for damages in a state court by an employer for injury done in a labor dispute, holding that there was no compensatory relief provided under the federal Act and hence no conflict with its provisions. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025, (1954).

[fol. 40] The most recent Supreme Court pronouncement in this area is found in Weber et al., v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 468, (1955) wherein the court held that the exclusive primary jurisdiction of the National Labor Relations Board prevented a state court's enjoining certain activities, although the federal board had determined that no violation of Section 8(b)(4)(D) was committed by those activities. The employer, the petitioning party, included violations of other subsections of the act in its complaint before the court which had not been filed as charges before the N.L.R.B.; the Supreme Court held that the Board's decision was strictly limited to the charge before it and was not tantamount to a determination that no unfair labor practices existed under the Act. However, in holding that the state court had no jurisdiction to issue an injunction in this particular case, Mr. Justice Frankfurter concluded the opinion of the court:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlaws some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion

of state action. Such was the situation in Garner v. Teamsters, C. & H. Local Union, supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' . . . This prenumbral area can be rendered progressively clear only by the course of litigation. . . ."

Certain language contained in federal cases have presaged the present situation where the N.L.R.B. determined not to hear the matter presented to it because of policy or budgetary reasons. It has been recognized that the Board need not accept every controversy of which it has jurisdiction, Haleston Drug Stores v. National Labor Relations Board, 187 F.2d 418. It was expressly mentioned that in the Garner case there was nothing to suggest that the federal Board would decline to exercise its powers once its jurisdiction was invoked, Garner v. Teamsters, C. & H. Union, 346 U.S. 485, 74 S. Ct. 161; 346 U.S. 485 (1953). Suggestions in the Bethlehem Steel Co. case, supra, and particularly the separate opinion of Mr. Justice Frankfurter, in which he was joined by Mr. Justice Murphy and Mr. Justice Rutledge, indicate that a different view is to be taken of state action where the N.L.R.B.'s determination not to hear a matter takes on the character of a decision, as in that case, and the situation where the N.L.R.B. refuses jurisdiction because of lack of funds or because of the view that the instant industrial relations are more appropriately a matter of state concern. The concurrence of Circuit Judge Pope in Capital Service, Inc. v. N.L.R.B., 204 F.2d 848 (1953) presented the problem now before us without determining the question.

Under this state of the law concerning the National Labor Relations Act, state court's ruling on the jurisdiction of state agencies to act after a declination of jurisdiction by the federal board, have both allowed and denied the state power. We take as our guides to the reasoning of the two views the cases of New York State Labor Relations Board v. Wags Trans. System, 130 N.Y.S.2d 731, affirmed 134 N.Y.S.2d 638, and Garmon v. San Diego Building Trades Council, (Cal.), 291 P.2d 1.

Although we might set forth factual differences between the two cases and perhaps reconcile them by distinguishing, our aim is merely to realize the two points of view in order to determine for this court the considerations involved. Both cases consider the provisions of Section 10(a) of the Taft-Hartley Act:[3]

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry* (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, *unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*" (Emphasis added)

On whether or not this provision provided an exclusive means by which state agency might acquire jurisdiction over matters covered by the federal Act, the New York Court said:

> "In adopting the proviso to Section 10(a) the clear policy of Congress was to prevent the application of state law and procedure which did not conform to the Taft-Hartley Act. Congress was not unaware of the earlier practice of ceding jurisdiction to local boards. Indeed, it considered the method desirable. But limitations were placed upon such cession. Apparently Congress decided that it was more important to have no cession than to have it without compliance with the standards it prescribed. A secondary purpose may

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[3] 29 U.S.C. sec. 160 (a).

well have been to encourage state legislation to adopt the Taft-Hartley provisions.

"There have been no cession agreements concluded with the New York Board or any other. Criticism of the proviso to section 10(a) has come from all quarters including Senator Taft who proposed its partial relaxation in 1949. No such amendments have been adopted . . .

"It follows quite logically that Congress provided in section 10(a) the sole means for transferring to state jurisdiction activities which are subject to the National Labor Relations Act, as amended.

"Thus the National Board has rightly decided that by virtue of the 1947 amendment it is without power to cede jurisdiction even over an essentially local business where the state statute does not impose the same requirements on unions seeking relief as does the National Act."

In support of this view it is important to note that this cession provision was added to the law subsequent to the Bethlehem Steel Co. case; also, the Senate Labor Committee in the 2nd session of the 83rd Congress proposed amendments, which were defeated, to the Taft-Hartley Act which included a provision to allow state courts to assert jurisdiction where the N.L.R.B. determined that the effect on commerce is not sufficiently substantial to warrant the exercise of the Board's jurisdiction. The New York Court quoted from the Pittsburgh Rys. Co. Substation Operators and Maintenance Employees' case, 357 Pa. 379, 54 A.2d 891, 174 A.L.R. 1045:

"The criterion to determine validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case; rather, it is whether Congress has asserted its power to regulate that relationship."

On the other hand, there are a great many equitable arguments in favor of allowing the state jurisdiction over industrial controversies where the federal Board refuses to do so. The federal Board has neither the money nor the

time to administer the vast field entrusted to it under the Act and, with increasing interstate commerce, must select matters which it will handle on the basis of the effect upon national interests. (See Mr. Justice Frankfurter's opinion in the Bethlehem Steel Co. case.) If the Board determines that the business done is predominantly local in character, the interests affected must likewise be predominantly local and hence a matter for regulation by the state. If the federal Board declines jurisdiction and the state is prohibited from taking action, a large segment of industrial relations is unregulated, contrary to the purposes of both federal and state acts, and the parties are left to self-help which has already proved disastrous to economy and internal peace.

[fol. 41] On these bases, the California Court in the Garmon case, supra, held:

> "The reason for prohibiting state courts from acting in cases in which the Board has jurisdiction is to obtain uniform application of the substantive rules as expressed by Congress, and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A remedy under federal laws available to an injured party may justify pre-emption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief. There is no conflict of jurisdiction when the federal board determines not to adjudicate the issues. Furthermore, a refusal to accept jurisdiction upon the ground that the issue presented does not sufficiently affect the national welfare to justify the Board's attention, in effect, is a declaration that the national labor policy will not be jeopardized if the state assumes jurisdiction.
>
> "When Congress enacted the applicable statutes, it must have been aware that an unfair labor practice may affect management and labor in a small business to the same extent as in a large industry. The difference is only the effect on the national labor and economic level. Certainly Congress did not intend to deprive a business having only a limited effect on interstate commerce of all protection in a labor-management

controversy. By giving the Board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the controversy will not affect the national economy."

It appears from our research that both views are logically valid under the existing decisions of the U. S. Supreme Court, and it is conceivable that both views might be legally valid under different circumstances. It is interesting to note that the New York State Labor Relations Board has, since the Wags decision, supra, declared its policy to take jurisdiction over those labor disputes in which it is evident that the National Labor Relations Board will decline to exercise its jurisdiction, under the view that the affirmation of that decision was strictly limited to instances where there is not a clear showing that the national board would have rejected jurisdiction. Raisch Motors, 35 LRRM 1631.

In the present case, there are no allegations that either party was deprived of rights which it might have obtained under the federal law had the NL.R.B. heard the charges presented to it. There are, in fact, no intimations that the national Board would have disposed of the matter in a way other than that in which the state board did. No substantive conflicts between the provisions of the Taft-Hartley Act concerning unfair labor practices (29 U.S.C., sec. 158) and the Utah Code (U.C.A. 1953, 34-1-8) have been alleged nor do any appear with reference to the particular charges involved, i.e., discrimination against union employees and refusal to bargain collectively with certified representatives.

Since we discover no conflict with federal authority in this case, and since the values of immediate legal supervision of labor controversies within this company can only be maintained through state action, we hold that the Utah Labor Relations Board had jurisdiction in this matter and affirm its decision and order. Costs to defendant.

We Concur:

J. Allan Crockett, Justice, F. Henri Henriod, Justice, Lester A. Wade, Jutsice, Geo. W. Worthen, Justice.

[fol. 42] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8393

P. S. GUSS, d/b/a PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, Plaintiff,

v.

UTAH LABOR RELATIONS BOARD and UNITED STEELWORKERS OF AMERICA, CIO, Defendants

JUDGMENT—April 30, 1956

This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is ordered, adjudged and decreed that the judgment of the Utah Labor Relations Board herein be, and the same is affirmed.

Costs to defendants.

[fols. 43-50] Petition for rehearing covering 11 pages filed May 11, 1956 omitted from this print. It was denied, and nothing more by order June 4, 1956.

[fol. 51] IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

ORDER DENYING REHEARING—June 4, 1956

Upon consideration of the Petition for Rehearing heretofore filed herein and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.

[fol. 52] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—June 14, 1956

I. Notice is hereby given that P. S. Guss, doing business as Photo Sound Products Manufacturing Company, appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme

Court of Utah affirming the decision and order of the Utah Labor Relations Board entered in this action on April 30, 1956, and the order of the Supreme Court of the State of Utah denying the Petition for Rehearing entered on June 4, 1956.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

II. The Clerk of the Court will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. The certification of the United Steel Workers of America, CIO as to the bargaining representative of the employees of appellant (R. 234).

2. The unfair labor practice charge filed with the National Labor Relations Board by the United Steel Workers of America against appellant (R. 290).

3. Letter from National Labor Relations Board dated June 21, 1954 declining to exercise jurisdiction over said unfair labor practice charge (R. 235).

4. Unfair labor practice charge filed against appellant by United Steel Workers of America with the Utah Labor Relations Board (R. 1).

[fol. 53] 5. Complaint issued by the Utah Labor Relations Board against appellant (R. 2).

6. Intermediate Report and Recommended Order of the Trial Examiner before the Utah Labor Relations Board (R. 329).

7. Decision and Order of the Utah Labor Relations Board (R. 329).

8. Motion for Rehearing before the Utah Labor Relations Board filed by appellant (R. 334).

9. Denial of Rehearing issued by Utah Labor Relations Board (R. 335).

10. Petition for Writ of Review to the Supreme Court of the State of Utah (R. 336).

11. Opinion and Order of the Supreme Court of the State of Utah affirming the order of the Utah Labor Relations Board.

12. Order of the Supreme Court of the State of Utah denying appellant's Petition for Rehearing.

13. Notice of Appeal to the Supreme Court of the United States filed on the 14th day of June, 1956.

III. The following question is presented by this appeal:

Whether the National Labor Relations Act, as amended (29 U.S.C. § 151-156), Article VI, clause 2 and Article I, sec. 8 of the Constitution of the United States preclude the Utah Labor Relations Board from asserting jurisdiction over an unfair labor practice charge filed under state law against appellant who is engaged in a manufacturing business affecting interstate commerce where the National Labor Relations Board has previously certified the union as the bargaining representative for appellant's employees under section 9(a) of the National Labor Relations Act, but [fols. 54-56] has declined to exercise its jurisdiction to hear the unfair labor practice charge filed under section 8 of said Act.

Dated this 14th day of June, 1956.

Harold P. Fabian, Peter W. Billings.

Proof of Service (omitted in printing)

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] Supreme Court of the United States, October Term, 1956

No. 280

Appeal from the Supreme Court of the State of Utah.

Order Noting Probable Jurisdiction—October 8, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar and assigned for argument immediately following No. 50.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUL 24 1956
JOHN T. FEY, Clerk

No. 280

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1956

P. S. GUSS dba PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

v.

UTAH LABOR RELATIONS BOARD,

Appellee.

On Appeal from the Supreme Court of the State of Utah

JURISDICTIONAL STATEMENT

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801 Continental Bank Building
Salt Lake City, Utah
Attorneys for Appellant

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and
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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1956

No._____.

P. S. GUSS dba PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

v.

UTAH LABOR RELATIONS BOARD,

Appellee.

On Appeal from the Supreme Court of the State of Utah

JURISDICTIONAL STATEMENT

Jurisdictional Statement

Appellant appeals from the order of the Supreme Court of the State of Utah entered on April 30, 1956, affirming the order of the Utah State Labor Relations Board, and from the order of the Supreme Court of Utah denying Petition for Rehearing entered June 4, 1956, and submits this statement to show that the

Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Court of Utah is reported at 296 P. 2d 733. No opinion was entered with the order denying rehearing. The opinion of the Supreme Court of Utah is attached hereto as Appendix "B".

Jurisdiction

This proceeding started as an unfair labor practice charge filed with the Utah Labor Relations Board by the United Steelworkers of America, CIO against appellant, under the Utah Labor Relations Act, Title 34, Ch. 1, Utah Code Annotated, 1953, secs. 1-15. Appellant defended on the ground that he is engaged in a business affecting interstate commerce, i.e., the manufacture of specialized photographic equipment for the United States Air Force and that by reason thereof the matter was within the exclusive jurisdiction of the National Labor Relations Board and the Utah Board had no jurisdiction to act under the Federal Constitution and the National Labor Relations Act. The order of the Supreme Court of Utah was entered April 30, 1956 and the order denying rehearing on June 4, 1956. Notice of appeal was filed in the Supreme Court of Utah on June 14, 1956.

Jurisdiction of the Supreme Court of the United States to review by appeal the decision of the Supreme Court of the State of Utah upholding the jurisdiction

of the Utah Labor Relations Board, is conferred by Title 28, USC, § 1257(2). The following cases substantiate the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case. *LaCrosse Telephone Company* v. *WERB*, 336 U.S. 18 (1948); *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U.S. 767 (1946); *United Auto Workers* v. *WERB*, — U.S. ——, 100 L. Ed. Adv. p. 666, decided June 4, 1956.

Statutes Involved

Sections 34-1-1, 2, 3, 8 and 10, Utah Code Annotated, 1953, the pertinent provisions of the Utah Labor Relations Act, and section 10(a) of the National Labor Relations Act, 61 Stat. 146, 29 U.S.C. 160, are set forth as Appendix "A" hereto.

The Question Presented

Whether the National Labor Relations Act, as amended (29 U.S.C. § 151-168), Article VI, clause 2 and Article I, sec. 8 of the Constitution of the United States preclude the Utah Labor Relations Board from asserting jurisdiction over an unfair labor practice charge filed under state law against appellant who is engaged in a manufacturing business affecting interstate commerce where the National Labor Relations Board has previously certified the union as the bargaining representative for appellant's employees under section 9(a) of the National Labor Relations Act, but has declined to exercise its jurisdiction to hear an unfair labor practice charge filed under section 8 of that Act.

Statement of the Case

Appellant is a Utah resident engaged in business in Salt Lake City under the trade name of Photo Sound Products Manufacturing Company as a manufacturer of specialized photographic equipment for the United States Air Force. The business during the period in question involved three Air Force contracts, one for chemical mixers in the amount of $84,896.73, one for printers in the amount of $37,222.42, and one for print straighteners in the amount of $29,906.35. To perform these contract for the Air Force, Photo Sound purchased from sources from outside the state, stainless steel in an amount "a little less than $50,000". The finished products were shipped to the Air Force at Wright-Patterson Field, Dayton, Ohio and other Air Force bases, both inside and outside the state of Utah.

Shortly after the company started operating, the United Steelworkers of America, CIO, in December of 1953, filed with the National Labor Relations Board, a petition under sec. 9 of the National Labor Relations Act for certification of that union as the bargaining representative for all of the employees of the company, except clerical and supervisory employees, as defined in the National Act. At the time for hearing on the petition on January 19, 1954, the company and the union entered into an agreement for a consent election to be conducted by the National Labor Relations Board. Among other things, this agreement recited that the employer, Photo Sound, was "engaged in commerce within the meaning of Section 2(6), (7) of the National Labor Relations Act."

The election was conducted by the National Board on April 26, 1954 and was won by the union, 15 to 11. Under date of May 4, 1954, the United Steelworkers of America, CIO, were duly certified by the National Labor Relations Board pursuant to section 9(a) of the National Labor Relations Act. (R. 1)

There ensued a period of charges and recriminations, interposed with collective bargaining sessions. Even before the first bargaining session, the union filed with the National Labor Relations Board, under section 8(a) (1), (3) and (5) of the National Labor Relations Act, a charge of unfair labor practices against Photo Sound. (R. 2) This charge was being investigated by the National Labor Relations Board during June and July, 1954, while the collective bargaining negotiations were in progress.

In July, 1954, the National Labor Relations Board issued new "yardsticks" which it indicated it would apply to determine whether it would, in a particular case, exercise the exclusive jurisdiction granted it by Congress. (NLRB Release No. R-445, July 1, 1954, and No. R-449, July 15, 1954). Applying this new yardstick, the National Board under date of July 21, 1954, declined to consider the matter of the charges filed by the United Steelworkers of America, CIO against Photo Sound, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominately local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction. I am therefore, refusing to issue complaint in this matter." (R.3)

The union, in this notice, was advised that it had the right to a review of this action taken by the National Board in declining to exercise its jurisdiction, but no such appeal was taken.

On July 29, 1954, the union filed substantially the same charge with the State Board that it had previously filed with the National Board. (R. 4) No complaint was issued by the State Board until January 14, 1955 and notice of hearing thereon issued the same date.

At the hearing on the charges before the State Board on February 7, 1955, the company presented its contention that the matter was not within the jurisdiction of the Utah Board, but within the exclusive jurisdiction of the National Labor Relations Board, and objected to the introduction of all evidence and other proceedings on the same grounds. (R. 7) At the close of the union's case, the company renewed its motion to dismiss on the ground that the proceedings were not within jurisdiction of the National Labor Relations Board. (R. 15) Ruling was reserved on the issue by the hearing examiner. (R. 16, 17)

The hearing examiner ruled that the business of Photo Sound affected intrastate as well as interstate commerce and concluded therefrom that the State Board had jurisdiction. (R. 20) Appellant filed its exceptions claiming the matter was exclusively within the jurisdiction of the National Board and that the National Board had not ceded such jurisdiction. (R. 29) The Utah State Labor Relations Board affirmed the ruling of the hearing examiner and issued

an order directing Photo Sound to cease and desist from refusing to bargain collectively with the CIO and directing it to take certain affirmative action with respect to certain of its ex-employees designated in the order. (R. 31-34)

After a motion for rehearing based upon the same contention, that section 10(a) of the National Act precluded state action (R. 35) was denied, a Writ of Review was obtained from the Supreme Court of Utah upon a petition alleging that

> "Contrary to the specific grant of exclusive power to the National Labor Relations Board under said Act, the Utah Labor Relations Board has entertained a charge filed with it by the United Steelworkers of America, CIO, and issued a complaint thereon against Petitioner. That despite the contentions of Petitioner concerning the lack of jurisdiction of said Board, said Board, under date of June 21, 1955, issued its decision and order relating to the labor relations of Petitioner and on June 29, 1955, denied Petitioner's motion for rehearing. At all times herein Petitioner has contended said Board was wholly without authority or jurisdiction to act in the matter." (R. 37)

The only issue briefed or argued to the Supreme Court of Utah was the Federal Constitutional question. The posture of the case before the Utah Supreme Court was thus stated in its opinion as follows:

> "The employer obtained this Writ of Review for the purpose of questioning the jurisdiction of the Utah Labor Relations Board. The sole question before us is whether the state board may act in relation to a business admittedly engaged in interstate commerce and subject to the National Labor Relations Act and the National Labor Relations Board when that

Board declines, upon the grounds stated, to exercise jurisdiction." *Guss* v. *Utah Labor Relations Board*, 296 P. 2d 733, 734.

The Questions are Substantial

1. This case poses the issue expressly not decided by this court in *Building Trades Council* v. *Kinard*, 346 U.S. 933 (1954) and is a corollary to the issue posed in *San Diego Building Trades Council et al.*, v. *Garmon*, No. 785, cert. granted May 7, 1956, 100 Sup. Ct. Adv. p. 600, and *Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL, et al* v. *Fairlawn Meats, Inc.*, No. 728, cert. granted May 7, 1956, 100 Sup. Ct. Adv. p. 600:

> Does a decision of the National Labor Relations Board in a particular case *not* to exercise its jurisdiction under its chameleon jurisdictional standards modify the doctrine of this court as announced in the *Bethlehem Steel*, supra, *LaCrosse*, supra, *Plankinton*, infra and *Garner*, infra cases that Congress, by the National Labor Relations Act has left no room for state action over labor relations in industries affecting interstate commerce?

The issue presented is determinative of the authority and jurisdiction of the State Labor Relations Boards, not only in Utah, but also in Wisconsin, New York, Colorado, Connecticut, Kansas, Massachusetts, Pennsylvania and Rhode Island in fields where the National Act grants exclusive jurisdiction to the National Labor Relations Board, but where the National Board has, for budgetary or other policy reasons, declined to exercise the jurisdiction granted it by Congress.

Since the statement of this court in *Building Trades Council* v. *Kinard*, supra:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the board decline to exercise its jurisdiction."

there has been a conflict in the state decisions as to jurisdiction of the state courts or Boards to act. Compare *New York State Labor Relations Board* v. *Wags*, 130 N.Y.S. 2d 731, aff'd. Lab. Rel. Rep. (35 L.R.R.M. 2058), and *Universal Car and Service Company* v. *IAM* Lab. Rel. Rep. (35 L.R.R.M. 2087) (Mich. 1954) with *Interstate Overall Service, Inc.* v. *New England Joint Board, Retail, Wholesale and Department Store Union, CIO*, Lab. Rel. Rep. (37 L.R.R.M. 1431) (Mass. 1955). There has even been a conflict between the state boards and state courts in the same state over the power of boards to act. Compare *New York State Labor Relations Board* v. *Wags*, supra, and *Raisch Motors* v. *New York State Labor Relations Board*, Lab. Rel. Rep. (35 L.R.R.M. 1631) (New York, 1955).

There is even a conflict between the Utah Supreme Court and the Court of Appeals for the Tenth Circuit. In the instant case, the state court has upheld the jurisdiction of the State Board. Yet in *Retail Clerks v. Your Food Stores*, 225 F. 2d 659, (10th Cir. 1955), the federal court held:

> "Moreover, the refusal by the NLRB to entertain the instant grievance on its merits

did not of itself alter the pertinent law thereby revesting the state court with authority to proceed. Amended Section 10(a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state agency, exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly preempted by Congress." 225 F. 2d 659, 653.

That case, though cited and argued to the Utah Supreme Court was not even mentioned in its opinion in the case at bar. Thus, in Utah, depending upon whether the issue is before a state or a federal court, different results will ensue. What this court has done in the diversity jurisdiction area by *Erie* v. *Thompkins*, 304 U.S. 64, it should do in situations where state courts have ignored decisions of applicable Courts of Appeal on governing Federal Constitutional questions.

2. The decision of the Utah Supreme Court is contrary to the decisions of this court. In *Bethlehem Steel* v. *New York State Labor Relations Board*, supra, this court held that certification of a foreman's union by the New York State Board in an industry subject to the National Labor Relations Act where the National Board had refused to issue a certification as a matter of policy was invalid and in conflict with the National Act and the Commerce clause of the Constitution.

In *LaCrosse Telephone Corporation* v. *WERB*,

supra, this court rejected a contention that the Wisconsin Board could exercise its jurisdiction in a certification proceeding until and unless the National Board chose to act. The *LaCrosse* and *Bethlehem* doctrine was applied in *Plankinton Packing Company* v. *WERB*, 338 U.S. 953 (1950) to an unfair labor practice charge filed under the State Act. The clear implication of these decisions of this court is that wherever the employer-employee relationship is one over which Congress has power of regulation and with regard to which Congress has acted, State power is suspended and cannot constitutionally be exercised. The criterion is not whether the agency administering the Federal law has acted or intends to act, but rather it is whether Congress has asserted its power to regulate the particular relationship.

This doctrine was extended in *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953) to state courts in the exercise of their equity jurisdiction to enjoin picketing and other practices which form a part of labor disputes and unfair labor practices placed exclusively by Congress in the hands of the NLRB.

This court summarized the doctrine in the *Garner* case as follows:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint, notice and hearing thereon, including judicial relief, pending a final administra-

tive order. Congress evidently considered that centralized administration of specially designated procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward local controversies. * * " 346 U.S. 485, 490.

and reaffirmed its application to state boards as well as state courts as follows:

> "A multiplicity of tribunals and a diversity of procedure are quite as apt to produce incompatible or conflicting adjudication, as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review, or on application of the federal board, precludes state courts from doing so. (citing cases) And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the confines of the federal board, also exclude state courts from like action." 346, U.S. 485, 491.

Despite this clear and well defined statement by this court as to the exclusiveness of the National Board's jurisdiction, and despite the fact that the National Board originally exercised its jurisdiction in the particular case, the Utah Labor Relations Board held that it had jurisdiction in the face of the claim of appellant that it cannot constitutionally so act. The Utah Supreme Court has sustained the order of the State Board.

The Utah Court gave two grounds for its decision:

> (1) The Utah law and the National Act are substantially similar and the Utah Board probably reached the same result as the National Board would have.

(2) Since the National Board has declined to exercise its jurisdiction "the values of immediate legal supervision of labor controversies within this company can only be maintained through state action." (296 P. 2d 733, 738)

It is submitted that these reasons and the result reached are contrary to the decisions of this court and flaunt the Commerce and Supremacy clauses of the Constitution and the express language of section 10(a) of the National Labor Relations Act.

As to the first basis for the decision of the Utah Supreme Court, this court in *LaCrosse Telephone Corporation* v. *WERB*, supra, said of the *Bethlehem* case:

> "Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us." 336, U.S. 18, 25.

As long as the National Board may exercise jurisdiction merely by unilaterally changing its jurisdictional standards (See *Pederson* v. *NLRB*, —— Fed. 2d——, Lab. Rel. Rep. (38 L.R.R.M. 2227) (2d Cir. 1956) a potentiality of conflict remains. The Court of Appeals for the Tenth Circuit in *Retail Clerks* v. *Your Food Stores*, supra, so held in quoting with approval the following from *Universal Car and Service Co.* v. *IAM*, supra:

> "If the jurisdiction of the state courts is to depend — not upon the Act of Congress and the actual jurisdiction of the NLRB — but upon the day-to-day or month- to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its

economic, scoial or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision." 225 F. 2d 659, 663.

This potential conflict was the basis for this court's decision in the *LaCrosse Telephone* case, supra:

> "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy. We are satisfied with the wisdom of the policy underlying the Bethlehem Case and adhere to it." 336, U.S. 18, 26.

The second basis of the Utah Supreme Court decision is in direct conflict with the express language of section 10(a) of the National Labor Relations Act itself. That act allows state action in industries affecting interstate commerce only where the National Board had ceded jurisdiction to a state board. As this court said in the *LaCrosse case*:

> "The result we have reached is not changed by the Labor Management Relations Act of 1947. That act grants the National Board authority, under specified conditions, to cede its jurisdiction to a state agency, but it does not appear that there has been any cession of jurisdiction to Wisconsin by the National Board in representation proceedings." 336, U.S. 18, 27.

And again in *Amalgamated Association of Street, Electric and Railway Employees* v. *WERB*, 340 U.S. 383, (1951):

> "* * * The legislative history of the 1947 Act refers to the decision of this court in Beth-

lehem Steel Co. vs. New York Labor Board, 330 U.S. 767 (1947) and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the acts covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." 340, U.S. 383, 397.

Unless and until there is an express ceding of jurisdiction to the Utah Labor Relations Board exclusive jurisdiction remains in the National Board. As the Court of Appeals for the Tenth Circuit said in *Retail Clerks Local* v. *Your Food Stores*, supra:

> "For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly preempted by Congress." 225, F. 2d 659, 663.

No cession of jurisdiction has been made to the Utah Board. All the National Board has done in this case is to elect for budgetary or other policy reasons not to exercise its jurisdiction to the extent authorized by Congress. Until Congress amends section 10(a) of the National Act to permit state action, the State Board cannot act in cases of this nature. An attempt of the State Legislature to authorize state boards to act in such circumstances or an interpretation by the state court that the State Legislature has so acted, is contrary to the Commerce and Supremacy clauses of the Federal Constitution.

It is submitted that the decision of the Supreme Court of Utah is patently in error and should be reversed.

Respectfully submitted,

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PETER W. BILLINGS

Counsel for Appellant

APPENDIX A

Utah Code Annotated, 1953

Section 34-1-1. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this section is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of others.

(2) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly, and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that whatever may be the right of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights

of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint, or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

Section 34-1-2. When used in this act:

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or

any state or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employer by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication within the state of Utah.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or

the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce within the state of Utah.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 34-1-8.

(9) The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.

(10) The term "secondary boycott" shall include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

(11) The term "election" shall mean a proceeding in which the employees in a collective bargaining unit cast a secret ballot for collective bagaining representatives or for any other purpose specified in this chapter and shall include elections conducted by the board, or, unless the context clearly indicates otherwise, by any tribunal having competent jurisdiction or whose purisdiction was accepted by the parties.

(12) The term "Labor Relations Board" means the industrial commission of Utah.

Section 34-1-3. (a) The industrial commission of Utah is designated as the labor relations board hereinafter referred to as the board.

(b) A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board, and two members of the board shall, at all times, constitute a quorum. The board shall have an official seal which shall be judicially noticed.

(c) The board shall at the close of each fiscal year make a report in writing to the legislature and to the governor stating in detail the cases it has heard, the decisions it has rendered, the names, salaries and duties of all employees and officers in the employ or under the supervision of the board, and an account of all moneys it has disbursed.

Section 34-1-8.

(1) It shall be an unfair labor practice for an employer, individually or in concert with others:

(a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 34-1-8.

(b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; provided, that subject to rules and regulations made and published by the board pursuant to 34-1-7(a) an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(c) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; provided, that nothing in this act shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 34-1-10(a), in the appropriate collective bargaining unit covered by such agreement when made.

(d) To refuse to bargain collectively with the representative of a majority of his employees in any collective bargaining unit; provided, that when two or more labor organizations claim to represent a majority of the employees in the bargaining unit the employer shall be free to file with the board a petition for investigation of certification of representatives and during the pendency of such proceedings the employer shall not be deemed to have refused to bargain.

(e) To bargain collectively with the representative of less than a majority of his employees in a collective bargaining unit.

(f) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 34-1-8, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights including those guaranteed in section 34-1-8, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To cooperate in engaging in, promoting, or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(d) To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(e) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion, or sabatoge, the obtaining, use or disposition

of materials, equipment, or services; or to combine or conspire to hinder or prevent the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(f) To take unauthorized possession of property of the employer.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1) and (2) of this section.

Section 34-1-10. (a) The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 34-1-8) affecting intrastate commerce or the orderly operation of industry. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.

Hearings.

(b) Whenever it is charged that any person has engaged in or is engaged in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a mem-

ber thereof, or before a designated agent or agency at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such preceeding the rules of evidence prevailing in courts of law or equity shall be controlling.

Report of Hearings — Orders of Board.

(c) The testimony taken by such member, agent, or agency or the board shall be reduced to writing and filed with the board. Thereafter in its discretion, the board upon notice may take further testimony or hear argument. If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. Such order may further require such person

to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the said complaint.

Time in Which Board May Modify Orders.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the board may at any time upon reasonable notice and in such manner as it may deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to Supreme Court to Enforce Orders.

(e) The board shall have power to petition the Supreme Court of Utah (wherein the unfair labor practice in question occurred or wherein such person resides or transacts business) for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be servied upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings

set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. No objection that has not been urged before the board, its member agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent or agency, the court may order such additional evidence to be taken before the board, its member, agent or agency, and to be made part of the transcript. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the state Supreme Court shall be exclusive and its judgment and decree shall be final.

Persons Aggrieved by Order of Board — Review.

(f) Any person aggrieved by a final order, the board granting or denying in whole or in part the relief sought, may obtain a review of such order in the Supreme Court of Utah by filing in such court a

written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith served upon the board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under subsection (e), and shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decress enforcing modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts, if supported by evidence, shall in like manner be conclusive.

Proceedings Not a Stay of Orders.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

Petitions to be Heard within Ten Days.

(h) Petitions filed under this act shall be heard expeditiously, and if possible within ten days after they have been docketed.

61 Stat. 146, 29 U.S.C. 160

Section 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging

in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustments or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

P. S. Guss, d/b/a Photo Sound Products Manufacturing Company,
Plaintiff,

v.

Utah Labor Relations Board and United Steelworkers of America, CIO,
Defendents.

McDONOUGH, Chief Justice:

The plaintiff, P. S. Guss, d/b/a Photo Sound Manufacturing Company, is engaged in the manufacturing of specialized equipment for the United States Air Force on a contract basis. The amount of these contracts with the government or its agencies totaled $152,025.50, and materials were purchased outside the state in an amount "a little less than $50,000." The finished products were shipped to Air Force Bases both within the state and without.

In December, 1953, the United Steelworkers of America, CIO, filed with the National Labor Relations Board, a petition for certification of that union as the bargaining representative for employees of the company. The company and the union entered into an agreement for a consent election to be conducted by the N.L.R.B., the agreement reciting that the employer

is "engaged in commerce within the meaning of Section 2(6)(7)[1] of the National Labor Relations Act." The election was won by the union and the United Steelworkers of America, CIO, was certified by the N.L.R.B.

The union filed charges of violations under Section 8[2] of the National Labor Relations Act with the N.L.R.B., alleging unfair labor practices on the part of the employer. On July 21, 1954, the National Labor Relations Board declined to consider the charges of the union, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominately local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction."

Thereafter, the union filed substantially the same charges with the State Board, which, after a hearing on the charges, ordered Photo Sound to cease and desist from refusing to bargain collectively with the CIO and further directing that certain discharged employees be reinstated with compensation for the time for which they had been unemployed.

The employer obtained this Writ of Review for the purpose of questioning the jurisdiction of the Utah Labor Relations Board. The sole question before us is whether the state board may act in relation to a business admittedly engaged in interstate commerce and subject to the National Labor Relations Act and the National Labor Relations Board when that Board

1. 29 U.S.C. § 152 (6) § (7).
2. 29 U.S.C. § 158.

declines, upon the grounds stated, to exercise jurisdiction.

Apparently, the N.L.R.B. determined not to take jurisdiction of this matter on the basis of jurisdictional standards established by the Board, summarized in N.L.R.B. Press Release R-449, July 15, 1954. These standards, promulgated to relieve the federal agency of some of the weight of matters falling within its jurisdiction under the broad provisions of Section 3(6)(7) of the Act, select arbitrary lines determined by the nature of the business and its size. The difficulty here is that if the Utah Labor Board has no jurisdiction and the National Labor Board refuses to accept jurisdiction, the parties are left to their own devices in securing industrial harmony, although both the federal and local government have evidenced concern with labor relations in providing law and agencies to administer it.

Plaintiff cites to us language from many cases decided by the U. S. Supreme Court concerning whether or not Congress intended to pre-empt the entire field of labor-management relations within its power to do so under the commerce clause of the Constitution. But concedes that an instance of the refusal of the N.L.R.B. to take jurisdiction, as here, has never been litigated before that court.

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, (1947) involved the question of whether the state board could certify a foreman's union subject to the National Labor Relations Act where the

national board had refused to certify that union as a matter of board policy. The court stated through Mr. Justice Jackson:

> " . . . If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, . . . its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

A similar result was reached in La Cross Telephone Corporation v. Wisconsin Employment Relations Board, 336 U. S. 18, 69 S. Ct. 379, 93 L. Ed. 463 (1948) and the Supreme Court further emphasized its view that a state's certification of a bargaining unit in the absence of N.L.R.B. action created conflict in the field of labor relations of groups in interstate commerce:

> " . . . We know that administrative practice also disposes of cases in which no order has been entered. Disposition of controversies on an administrative as distinguished from a formal basis will often reflect the attitudes of the National Board which have not been reduced to

orders in those specific cases. A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. . . ."

On the basis of these two cases, the Court reversed a decision of the Wisconsin Supreme Court (225 Wis. 285, 38 N.W.2d 688) which held that the State Employment Relations Board had jurisdiction over a matter of *unfair labor practices* in the absence of a federal board ruling. Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953, 70 S. Ct. 491, 94 L. Ed. 588 (1950).

However, certain inroads have been made upon the doctrine of exclusiveness of the National Board's jurisdiction under the familiar principle the Congress may determine how far its regulation of interstate commerce shall go, and when it circumscribes its regulation, and occupies only a limited field, state regulation outside that limited field is not forbidden or displaced. Where the peace of the community is threatened by mass picketing, threats, property damage, and obstruction of streets, a state may act to enjoin such activities. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820 L. Ed. 1154, (1942). Recurrent, unannounced work stoppages are neither prohibited nor protected by the Taft-Hartley Act and hence a state may control that conduct. International Union v. Wisconsin Employment Relations Board, 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651, (1949). See also Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,

336 U. S. 301, 69 S. Ct. 584, 93 L. Ed. 691, (1949). The Supreme Court has permitted an action for damages in a state court by an employer for injury done in a labor dispute, holding that there was no compensatory relief provided under the federal Act and hence no conflict with its provisions. United Constr. Workers v. Laburnum Constr. Corp., 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025, (1954).

The most recent Supreme Court pronouncement in this area is found in Weber et al., Anheuser-Busch, Inc., 348 U. S. S. Ct. 480, 99 L. Ed. 468, (1955) wherein the court held that the exclusive primary jurisdiction of the National Labor Relations Board prevented a state court's enjoining certain activities, although the federal board had determined that no violation of Section 8(b)(4)(D) was committed by those activities. The employer, the petitioning party, included violations of other subsections of the act in its complaint before the court which had not been filed as charges before the N.L.R.B.; the Supreme Court held that the Board's decision was strictly limited to the charge before it and was not tantamount to a determination that no unfair labor practices existed under the Act. However, in holding that the state court had no jurisdiction to issue an injunction in this particular case, Mr. Justice Frankfurter concluded the opinion of the court:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlaws some aspects of labor activities and left others free for the operation of economic forces.

> As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters, C. & H. Local Union, supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' . . . This prenumbral area can be rendered progressively clear only by the course of litigation . . ."

Certain language contained in federal cases have presaged the present situation where the N.L.R.B. determined not to her the matter presented to it because of policy or budgetary reasons. It has been recognized that the Board need not accept every controversy of which it has jurisdiction, Haleston Drug Stores v. National Labor Relations Board, 187 F. 2d 418. It was expressly mentioned that in the Garner case there was nothing to suggest that the federal Board would decline to exercise its powers once its jurisdiction was invoked, Garner v. Teamsters, C. & H. Union, 346 U. S. 485, 74 S. Ct. 161, 346 U. S. 485, (1953). Suggestions in the Bethlehem Steel Co. case, supra, and particularly the separate opinion of Mr. Justice Frankfurter, in which he was joined by Mr. Justice Murphy and Mr. Justice Rutledge, indicate that a different view is to be taken of state action where the N.L.R.B.'s determination not to hear a matter takes on the character of a decision, as in that case, and the situation where the N.L.R.B. refuses jurisdiction because of lack of funds or because of the view that the instant industrial relations are more appro-

priately a matter of state concern. The concurrence of Circuit Judge Pope in Capital Service, Inc. v. N.L.R.B., 204 F. 2d 848 (1953) presented the problem now before us without determining the question.

Under this state of the law concerning the National Labor Relations Act, state court's ruling on the jurisdiction of state agencies to act after a declination of jurisdiction by the federal board, have both allowed and denied the state power. We take as our guides to the reasoning of the two views the cases of New York State Labor Relations Board v. Wags Trans. System, 130 N.Y.S. 2d 731, affirmed 134 N.Y.S. 2d 638, and Garmon v. San Diego Building Trades Council, (Cal.), 291 P. 2d 1.

Although we might set forth factual differences between the two cases and perhaps reconcile them by distinguishing our aim is merely to realize the two points of view in order to determine for this court the considerations involved. Both cases consider the provisions of Section 10(a) of the Taft-Hartley Act:[3]

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry* (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may

3. 29 U.S.C. sec. 160 (a).

involve labor disputes affecting commerce, *unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*" (Emphasis added)

On whether or not this provision provided an exclusive means by which state agency might acquire jurisdiction over matters covered by the federal Act, the New York Court said:

> "In adopting the proviso to Section 10(a) the clear policy of Congress was to prevent the application of state law and procedure which did not conform to the Taft-Hartley Act. Congress was not aware of the earlier practice of ceding jurisdiction to local boards. Indeed, it considered the method desirable. But limitations were placed upon such cession. Apparently Congress decided that it was more important to have no cession than to have it without compliance with the standards it prescribed. A secondary purpose may well have been to encourage state legislation to adopt the Taft-Hartley provisions.
>
> "There have been no cession agreements concluded with the New York Board or any other. Criticism of the proviso to section 10(a) has come from all quarters including Senator Taft who proposed its partial relaxation in 1949. No such amendments have been adopted . . .
>
> "It follows quite logically that Congress provided in section 10(a) the sole means for transferring to state jurisdiction activities which are subject to the National Labor Relations Act, as amended.
>
> "Thus the National Board has rightly decided that by virtue of the 1947 amendment it is without power to cede jurisdiction even

over an essentially local business where the state statute does not impose the same requirements on unions seeking relief as does the National Act."

In support of this view it is important to note that this cession provision was added to the law subsequent to the Bethlehem Steel Co. case; also, the Senate Labor Committee in the 2nd session of the 83rd Congress proposed amendments, which were defeated, to the Taft-Hartley Act which included a provision to allow state courts to assert jurisdiction where the N.L.R.B. determined that the effect on commerce is not sufficiently substantial to warrant the exercise of the Board's jurisdiction. The New York Court quoted from the Pittsburgh Rys. Co. Substation Operators and Maintenance Employees' case, 357 Po. 379, 54 A. 2d 891, 174 A.L.R. 1045:

> "The criterion to determine validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case; rather, it is whether Congress has asserted its power to regulate that relationship."

On the other hand, there are a great many equitable arguments in favor of allowing the state jurisdiction over industrial controversies where the federal Board refuses to do so. The federal Board has neither the money nor the time to administer the vast field entrusted to it under the Act and with increasing interstate commerce, must select matters which it will handle on the basis of the effect upon national interests. (See Mr. Justice Frankfurter's opinion in the Bethlehem Steel Co. case.) If the Board determines

that the business done is predominantly local in character, the interests affected must likewise be predominatly local and hence a matter for regulation by the state. If the federal Board declines jurisdiction and the state is prohibited from taking action, a large segment of industrial relations is unregulated, contrary to the purposes of both federal and state acts, and the parties are left to self-help which has already proved disastrous to economy and internal peace.

On these bases, the California Court in the Garmon case, supra, held:

> "The reason for prohibiting state courts from acting in cases in which the Board has jurisdiction is to obtain uniform application of the substantive rules as expressed by Congress, and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . .A remedy under federal laws available to an injured party may justify pre-emption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief. There is no conflict of jurisdiction when the federal board determines not to adjudicate the issues. Furthermore, a refusal to accept jurisdiction upon the ground that the issue presneted does not sufficiently affect the national welfare to justify the Board's attention; in effect, is a declaration that the national labor policy will not be jeopardized if the state assumes jurisdiction.
>
> "When Congress enacted the applicable statutes, it must have been aware that an unfair labor practice may effect management and labor in a small business to the same extent as in a large industry. The difference is only the effect

on the national labor and economic level. Certainly Congress did not intend to deprive a business having only a limited effect on interstate commerce of all protection in a labor-management controversy. By giving the Board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the controversy will not affect the national economy."

It appears from our research that both views are logically valid under the existing decisions of the U. S. Supreme Court, and it is conceivable that both views might be legally valid under different circumstances. It is interesting to note that the New York Labor Relations Board has, since the Wags decisions, supra, declared its policy to take jurisdiction over those labor disputes in which it is evident that the National Labor Relations Board will decline to exercise its jurisdiction, under the view that the affirmation of that decision was strictly limited to instances where there is not a clear showing that the national board would have rejected jurisdiction. Raisch Motors, 35 LRRM 1631.

In the present case, there are no allegations that either party was deprived of rights which it might have obtained under the federal law had the N.L.R.B. heard the charges presented to it. There are, in fact, no intimations that the national Board would have disposed of the matter in a way than in which the state board did. No substantive conflicts between the provisions of the Taft-Hartley Act concerning unfair labor practices (29 U.S.C., sec. 158) and the Utah Code (U.C.A. 1953, 34-1-8) have been alleged nor do

any appear with reference to the particular charges involved, i.e., discrimination against union employees and refusal to bargain collectively with certified representatives.

Since we discover no conflict with federal authority in this case, and since the values of immediate legal supervision of labor controversies within this company can only be maintained through state action, we hold that the Utah Labor Relations Board had jurisdiction in this matter and affirm its decision and order. Costs to defendants.

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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1956

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

vs.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT
OF THE
STATE OF UTAH

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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1956

No. 280

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

vs.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT
OF THE
STATE OF UTAH

OPINION BELOW

The opinion of the Supreme Court of Utah is reported at 296 P. 2d 733. No opinion was entered with the order denying rehearing.

JURISDICTION

The judgment of the Supreme Court of Utah was entered April 30, 1956 and the order denying rehearing on June 4, 1956. Notice of appeal was filed in the Supreme Court of Utah on June 14, 1956. Probable jurisdiction was noted October 8, 1956.

Jurisdiction of this court rests on Title 28, U.S.C., § 1257 (2).

STATUTES INVOLVED

Sections 34-1-8 and 9, Utah Code Annotated, 1953, the pertinent provision of the Utah Labor Relations Act, and sections 8, 9 and 10(a) of the National Labor Relations Act, 61 Stat. 146, 29 U.S.C. 158-160(a), are set forth as Appendix "A" hereto.

THE QUESTION PRESENTED

Whether the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. § 151-168), Article VI clause 2 and Article I, sec. 8 of the Constitution of the United States preclude the Utah Labor Relations Board from asserting jurisdiction over an unfair labor practice charge filed under state law against appellants who is engaged in a manufacturing business affecting interstate commerces where the National Labor Relations Board has previously certified the union as the bargaining representative for appellant's employees under section 9(a) of the National Labor Relations Act, but has declined to exercise its jurisdiction to hear a substantially similar unfair labor practice charge filed under section 8 of that act.

STATEMENT OF THE CASE

Appellant is a Utah resident engaged in business in Salt Lake City under the trade name of Photo Sound Products Manufacturing Company as a manufacturer of specialized photographic equipment for the United States Air Force. The business during the period in question involved three Air Force contracts, one for chemical mixers in the amount of $84,896.73,

one for printers in the amount of $37,222.42, and one for print straighteners in the amount of $29,906.35. To perform these contracts for the Air Force, Photo Sound purchased from sources outside the state, stainless steel in an amount "a little less than $50,000". The finished products were shipped to the Air Force at Wright-Patterson Field, Dayton, Ohio and other Air Force bases, both inside and outside the state of Utah.

Shortly after the company started operating, the United Steelworkers of America, CIO, in December of 1953, filed with the National Labor Relations Board, a petition under sec. 9 of the National Labor Relations Act for certification of that union as the bargaining representative for all employees of the company, except clerical and supervisory employees, as defined in the national act. At the time for hearing on the petition on January 19, 1954, the company and the union entered into an agreement for a consent election to be conducted by the National Labor Relations Board. Among other things, this agreement recited that the employer, Photo Sound, was "engaged in commerce within the meaning of Section 2 (6), (7) of the National Labor Relations Act."

The election was conducted by the National Board on April 26, 1954 and was won by the union, 15 to 11. Under date of May 4, 1954, the United Steelworkers of America, CIO, was duly certified by the National Labor Relations Board pursuant to section 9 (a) of the National Labor Relations Act. (R. 1)

There ensued a period of charges and recrimina-

tions, interposed with collective bargaining sessions. Even before the first bargaining session, the union filed with the National Labor Relations Board, under sections 8 (a), (1), (3) and (5) of the National Labor Relations Act, a charge of unfair labor practices against Photo Sound. (R. 2-3) This charge was being investigated by the National Labor Relations Board during June and July, 1954, while the collective bargaining negotiations were in progress.

In July, 1954, the National Labor Relations Board issued new "yardsticks" which it indicated it would apply to determine whether it would, in a particular case, exercise the exclusive jurisdiction granted it by Congress. (NLRB Release No. R-445, July 1, 1954, and No. R-449, July 15, 1954). Applying this new yardstick, the National Board, through its Regional Director declined under date of July 21, 1954 to consider the matter of the charges filed by the United Steelworkers of America, CIO against Photo Sound, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominately local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction. I am therefore, refusing to issue complaint in this matter." (R. 4)

The union, in this notice, was advised that it had the right to a review of this action by the National Board in declining to exercise its jurisdiction. No such appeal was taken.

On July 30, 1954, the union filed substantially the same charge with the State Board that it had pre-

viously filed with the National Board (R. 5-6). No complaint was issued by the Board until January 14, 1955 and notice of hearing thereon issued the same date.

At the hearing on the charges before the State Board on February 7, 1955, the company presented its contention that the matter was not within the jurisdiction of the Utah Board, but within the exclusive jurisdiction of the National Labor Relations Board, (R. 9) and objected to the introduction of all evidence and other proceedings on the same grounds. (R. 11) At the close of the union's case, the company renewed its motion to dismiss on the ground that the proceedings were not within jurisdiction of the National Labor Relations Board. (R. 14) Ruling was reversed on the issue by the hearing examiner. (R. 14)

The hearing examiner ruled that the business of Photo Sound affected intrastate as well as interstate commerce and concluded therefrom that the State Board had jurisdiction. (R. 17-18) Appellant filed its exceptions claiming the matter was exclusively within the jurisdiction of the National Board and that the National Board had not ceded such jurisdiction. (R. 22) The Utah State Labor Relations Board affirmed the ruling of the hearing examiner and issued an order directing Photo Sound to cease and desist from refusing to bargain collectively with the CIO and directing it to take certain affirmative action with respect to certain of its ex-employees designated in the order (R. 18-21).

After a motion for rehearing based upon the same contention, that section 10 (a) of the national act

precluded state action (R. 22) was denied, a Writ of Review was obtained from the Supreme Court of Utah upon a petition alleging that:

> "Contrary to the specific grant of exclusive power to the National Labor Relations Board under this Act, the Utah Labor Relations Board has entertained a charge filed with it by the United Steelworkers of America, CIO and issued a complaint thereon against Petitioner. That despite the contentions of Petitioner concerning the lack of jurisdiction of said Board, said Board, under date of June 21, 1955, issued its decision and order relating to the labor relations of Petitioner and on June 29, 1955, denied Petitioner's motion for rehearing. At all times herein Petitioner has contended said Board was wholly without authority or jurisdiction to act in the matter." (R. 23)

The only issue briefed or argued to the Supreme Court of Utah was the federal constitutional question. The posture of the case before the Utah Supreme Court was thus stated in its opinion as follows:

> "The employer obtained this Writ of Review for the purpose of questioning the jurisdiction of the Utah Labor Relations Board. The sole question before us is whether the state board may act in relation to a business admittedly engaged in interstate commerce and subject to the National Labor Relations Act and the National Labor Relations Board when that Board declines, upon the grounds stated, to exercise jurisdiction." *Guss* v. *Utah Labor Relations Board*, 296 P. 2d 733, 734.

The Supreme Court of Utah, relying on the views of the California court in *Garmon* v. *San Diego Bldg. Trades Council*, 291 P. 2d 1, cert. granted 5/7/56,

#50, Oct. Term 1956, held that the State Board had jurisdiction and affirmed its order. Rehearing was denied and this appeal was taken under 28 U.S.C. 1257 (2).

SUMMARY OF ARGUMENT

(1) The industry in which appellant is engaged —the manufacture of specialized photographic equipment for the United States Air Force—is clearly one affecting interstate commerce. The trial examiner for the Utah Board so found (R. 16) and the Utah Board adopted his findings (R. 19). As such, the National Labor Relations Act applies and the National Board has exclusive jurisdiction over his labor relations. *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234 (1946); *LaCrosse Telephone Co.* v. *WERB*, 336 U.S. 18, 93 L ed. 463 (1948) and *Plankinton Packing Co.* v. *WERB*, 338 U.S. 953 (1950). The particular acts charged are those with which the national act expressly deals (29 U.S.C. 158 (a) (1), (3) and (5). The only reason the National Board refused to act was because it adopted, during the course of the case, new "jurisdictional yardsticks" self-limiting the exercise of its jurisdiction to industries it considered would more nearly "effectuate the policy of the Act to exercise jurisdiction".

(2) Congress prescribed in section 10 (a) of the National Labor Relations Act, as amended in 1947, the exclusive method of ceding jurisdiction to state boards in cases involving borderline industries insofar as affecting interstate commerce is concerned. "And

when state enforcement mechanisms so helpful to federal officers are to be excluded, Congress may say so, as in the Taft-Hartley Act (29 U.S.C. 160 (a)", *California* v.*Zook*, 336 U.S. 725, 732, 93 L. ed. 1005, 1001 (1949). The Utah act does not meet the requirements of section 10 (a) because of numerous differences between the Utah act and the national act in parallel provisions relating to certification of unions as the collective bargaining representative and the prevention of unfair labor practices. Since the National Board cannot cede jurisdiction pursuant to the national act, it cannot achieve the same result by merely abdicating its jurisdiction for budgetary or other internal policy reasons. The potentiality of conflict with the National Board as expressed in the National Labor Relations Act and the decisions of this Court still remains.

(3) The assumption of jurisdiction by the Utah Board and the Utah Supreme Court on the basis that otherwise labor relations in the tidelands area, in which appellant's business falls, will go unregulated is not warranted under the terms of the national act. The problem of avoiding an inequitable result due to the abdication by the National Board of its responsibility and the consideration of the wisdom of Congress in its solution of the problem are not appropriate subjects for judicial inquiry. This is a matter for consideration by the Congress. Until Congress changes the law or remedies the National Board's budgetary problems, the supremacy and commerce clauses of the Constitution preclude state action.

ARGUMENT

POINT I

THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OF THE LABOR RELATIONS OF PHOTO SOUND PRODUCTS MANUFACTURING COMPANY.

The judicial plowing of the field of federal-state relationship in the administration of labor relations since the enactment of the Wagner Labor Relations Act in 1935 and its amendment in 1947 makes it clear that the National Labor Relations Board has jurisdiction in this matter and that such jurisdiction of the National Board is exclusive, Congress having pre-empted the field, except for certain particular instances specifically spelled out in the Act.

Since early in NLRA history this court has held that Congress intended to exercise the full scope of its authority under the commerce clause in the labor relations field. In *NLRB* v. *Fainblatt*, 306 U.S. 601 83 L ed. 1014 (1939) this Court held the power of Congress to regulate interstate commerce is plenary and extends to all such commerce, be it great or small and that:

> "The Act on its face, thus evidences the intention of Congress to exercise whatever power is constitutionally given it * * * we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend upon any particular volume of commerce affected * * *"

The trial examiner of the Utah Labor Relations Board, without referring to the approximately $50,000.00 worth of purchase in interstate commerce of Photo Sound found:

> "It must be conceded that the Respondent is manufacturing products almost all of which are shipped outside the State of Utah. It is also true that a large amount of the dollars expended in performing these contracts are spent for labor and the purchase of material on a local level. It is thus apparent, that intrastate commerce as well as interstate commerce is affected by this dispute." (R. 16)

Since the Utah Board adopted this finding that interstate commerce as well as intrastate is affected by the dispute between Photo Sound and the CIO (R. 18), it is clear that the labor relations of Photo Sound Products Manufacturing Company, and particularly charges of coercion, discrimination and refusal to bargain, matters expressly dealt with by sections 8 (a) (1), (3) and (5) of the national act, are within the National Board's exclusive jurisdiction. *NLRB* v. *Fainblatt*, supra, *Consolidated Edison* v. *NLRB* 305 U.S. 197, 83 L ed. 126 (1938), *Santa Cruz Packing Co.* v. *NLRB*, 303 U.S. 453, 82 L ed. 954 (1938).

The National Board itself asserted jurisdiction to conduct an election among appellant's employees and, pursuant to section 9 (a) of the National Labor Relations Act, certified under date of May 4, 1954, that a majority had chosen United Steelworkers as their representative (R. 1) Only two weeks later the union filed with the National Board an unfair labor practice charge asserting violations of sections 8 (a) (1), (3) and (5) of the National Labor Relations Act and alleging particularly interference with the employees' right of union membership as guaranteed by section 7 of the national act, discriminatory discharges

and refusal to bargain collectively (R. 2 and 3).

It is submitted that this Court has clearly established that the National Board's jurisdiction attaching, such jurisdiction is exclusive. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234 (1946), *LaCrosse Telephone Co.* v. *WERB*, 336 U.S. 18, 93 L ed. 463 (1948) and *Plankinton Packing Co.* v. *WERB*, 338 U.S. 953 (1950).

In the *Bethlehem Steel* case, the issue of the federal-state relationship was first adjudicated. The issue there was whether the New York Board could certify a foreman's union in an industry subject to the National Labor Relations Act where the National Board had refused to certify such union as a matter of Board policy. This Court held that certification of such union by the State Board was invalid as in conflict with the national act and the commerce clause of the Constitution. In so holding the Court stated:

> "Comparison of the state and federal statutes, will show that both governments have laid hold of the same relation for regulation, and it involves the same employers and the same employees. Each is delegated through administrative authority, a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections, and determining the appropriate unit for bargaining in in the same plant. * * * We therefore conclude, that it is beyond the power of New York to apply its policies to these Appellants, as attempted herein."

In *LaCrosse Telephone Co.* v. *WERB*, supra, the

Supreme Court of Wisconsin had held that the Wisconsin Board could exercise its jurisdiction to determine and certify appropriate bargaining units until the National Board undertook to act. This Court rejected this view on the authority of the *Bethlehem Steel* case, stating that since the employer in question was subject to the act and regulation by the Board, the situation was "too fraught with potential conflict to permit the intrusion of the state agency even though the National Board had not acted" (330 U.S. at 25) and that "the uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."

The *Plankinton Packing Co.* case was one involving unfair labor practices, rather than certification of appropriate bargaining units. This court, in a *per curiam* decision, citing the *Bethlehem Steel* and *La-Crosse Telephone Company* cases, held the Wisconsin Board to be without jurisdiction in such a matter.

In *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L ed. 228 (1953), the same principle was applied to state courts as was to state boards in the *Bethlehem Steel* and *LaCrosse Telephone* cases, and this Court held that the Pennsylvania court had no jurisdiction to enjoin picketing practicies which were in violation of both state and federal law, stating:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investiga-

tion, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the Federal Board, precludes state courts from doing so.* Cf. *Myers* v. *Bethlehem Shipbuilding Corp.* 303 U.S. 41 82 L ed. 638, 309 U.S. 261, 84 L ed. 738, 60 S. Ct. 561. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the Federal Board also exclude state courts from like action. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed 1234, 67 S. Ct. 1026.

Of particular pertinence here, where the union first called upon the National Board to determine its jurisdiction is this Court's statement in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481, 99 L ed. 546 (1955) quoted with approval by this court in *Local Union No. 25* v. *New York, N. Y. & H. R. Co.* 350 U.S. 155, 100 L ed. Adv. p. 164, 168 (1956):

"But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections

prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

After "carefully investigating and considering" the charge filed with it (R. 3), the National Board, under date of July 21, 1954, advised the complaining union that further proceedings were not warranted "inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction." The Board further advised the union that pursuant to National Labor Relations Board rules and regulations it might obtain a review of the action by filing a request for such review within ten days of the receipt of the letter. No appeal was taken by the union from this refusal to act by the National Board. However, a week later the union filed a charge with the Utah Board alleging the same acts of interference with the right of the union membership, discriminatory discharges and refusal to bargain. (R. 5)

The only issue here is whether the actions of the National Board in declining to excercise its jurisdiction "to prevent any person from engaging in any unfair labor practice affecting commerce" conveys to or creates any jurisdiction in the Utah State Board. It is appellant's position that under the terms of the National Labor Relations Act and the commerce clause of the Constitution of the United States such refusal to assert jurisdiction neither does, nor can do so.

POINT II

THE PROVISIONS OF SECTION 10 (a) OF THE NATIONAL LABOR RELATIONS ACT PRECLUDE THE UTAH BOARD FROM ASSERTING JURISDICTION.

A. THE NATIONAL LABOR RELATIONS BOARD HAS NOT CEDED JURISDICTION.

Section 10 (a) of the National Labor Relations Act as amended 1947 provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; provided, that the Board is empowered *by agreement with any agency of any State or Territory* to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, *unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.* (emphasis supplied)

There is no contention here that the National Board has entered into an agreement with the Utah Board to cede its jurisdiction. In the *LaCrosse Telephone* case this Court referred to this provision and stated:

> "The result we have reached is not changed by the Labor Management Relations Act of 1947. That Act grants the National Board authority, under specified conditions to cede its jurisdiction to a state agency, but it does not

appear that there has been any cession of jurisdiction to Wisconsin by the National Board in any representation proceeding."

As a matter of fact, the National Board cannot cede jurisdiction. The Board itself advised this court in a memorandum filed in connection with *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 98 L ed. 1025 (1954) quoted in a footnote at page 659 of that case, that it is:

> ". . . not feasible under the limitations prescribed by the Act to consummate agreements ceding jurisdiction under the proviso in section 10 (a)."

The reason for such inability is, of course, that neither the Utah act nor any other state act is sufficiently consistent with the national act to enable the Board to meet the proviso of section 10 (a). For example, the following are some of the inconsistent provisions in the Utah and the national acts with respect to the very issues involved in the case at bar.

Starting with the very determination of an appropriate bargaining unit, the acts are inconsistent. Section 9 (b) of the federal act gives the National Board the power to determine the appropriate unit, provided:

> "That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees

in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Section 34-1-9-7(b) of the Utah act contains no such limitation on the Utah State Board. Accordingly, inconsistencies could very well arise between two competing industries in Utah as to the composition of groups of their employees for various representative purposes, depending upon which board has jurisdiction and which made the determination of the appropriate unit.

Under the federal act, sections 9 (f), (g) and (h) require a union to file with the National Board financial statements and reports and non-communist affidavits of its officers before the Board may assert its jurisdiction at the request of such a union. See *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 100 L ed. Adv. p. 514 (1956). No such condition precedent is present in the Utah act.

Section 34-1-8 (2) of the Utah act defining unfair labor practices of employees individually or in concert with others, added to the Utah section in 1947, differs substantially from section 8 (b) of the federal act defining unfair labor practices of a labor organ-

ization or its agents. See Appendix A for a section by section comparison.

Under the Utah act, (Sec. 34-1-8 (1) (e)) it is an unfair labor practice for an employer to bargain collectively with representatives of less than a majority of his employees in a collective bargaining unit. No such provision appears in the federal act.

The national act (section 8 (d)) requires sixty days' notice of termination of a collective bargaining agreement and prohibits a strike or lockout for a period of sixty days' after such notice, or until after expiration of the contract, whichever is later. No such provision appears in the Utah act.

From this brief outline and comparison of the provisions of the state and federal statutes pertaining to certification of a union as the collective bargaining representative for units of employees and defining unfair labor practices of labor and management, it is clear that the Utah act does not meet the requirements for cession of jurisdiction set forth in the proviso to section 10 (a) of the National Labor Relations Act.

It is equally clear that while the National Board's jurisdictional yardstick may remove the possibility of conflict over jurisdiction between the Utah and the Federal Board—at least until the National Board changes its yardsticks or some court determines the yardsticks are an abuse of discretion, in a particular case, (cf. *Street Railway Employees* v. *NLRB*, ... F. 2d ...., 39 L.R.R.M. 2001 (D.C. Cir. 1956)), the potential conflict and inconsistencies between the two acts as well as the uncertainty as to how long the National Board will abandon the field still remains.

Thus the reason for the *Bethlehem* rule as well as the clear mandate of Congress in section 10 (a) of the national act forbids state action.

B. THE REFUSAL OF THE NATIONAL LABOR RELATIONS BOARD TO EXERCISE ITS JURISDICTION DOES NOT CREATE JURISDICTION IN THE STATE BOARD.

Under the authorities cited and quoted above, it is incontravertible that the National Board would and does have jurisdiction in this matter. The only new fact in the case is that the National Board, midway in its handling of the labor relations of Photo Sound, for budgetary or other reasons, best known to the board, changed its policy and declined to exercise its jurisdiction in this and other cases involving businesses the size and nature of Photo Sound. It has not, by the adoption of these new standards or "yardsticks", held that it no longer has jurisdiction.

Even prior to the 1947 amendments to the Wagner Act, the National Board had, on a case by case basis, refrained from asserting jurisdiction over matters affecting essentially local operations. Compare, for example, the apparent inconsistent exercise of jurisdiction by the National Board over the May Department Stores Co. in St. Louis, Missouri, (*NLRB* v. *May Dept. Stores Co.*, 146 F. 2d 66 (8th Cir., 1944)) where no state board was in existence and the assertion of jurisdiction by the New York State Board over R. H. Macey & Co., Inc. (In re R. H. Macey & Co., Inc., et al, 21 L.R.R.M. 1091 (1948)). The appendix to the separate opinion of Mr. Justice Frankfurter in *Bethlehem Steel Co.* v. *N. Y. State Labor Relations*

Board, 330 U.S. 767, 784 gives a documentary outline of the understanding between the National and State Boards in New York prior to the 1947 amendments.

The Board's policy in this respect is stated in its opinion in *Breeding Transfer Co.* 110 NLRB 493, 35 L.R.R.M. 1020 (1954):

> "It has been the consistent position of the Board that it better effectuates the purposes of the Act, and promotes the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce. In futherance of that policy, the Board in October 1950 adopted certain standards to govern its assertion of jurisdiction. Those standards resulted from a study of the Board's experience up to that time."

These standards and the reasons therefor, were announced by the Board in a press release dated October 5, 1950, (26 L.R.R.M. 51) as follows:

> "The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> "The Board has long been of the opinion that it would better effectuate the purposes of the act and promote the prompt handling of major cases, *not to exercise its jurisdiction to the fullest possible extent under the authority delegated to it by Congress, but to limit that exercise* to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should in our opinion be maintained.

"The Board thereby reiterated its policy *of not exercising jurisdiction despite its power to do so* over businesses so local in character that a sufficient impact upon interstate commerce *to justify an already burdened Federal Board in expending time, energy and public funds.*" (emphasis supplied)

The right of the National Board to use discretion in determining whether to exercise its jurisdiction under such yardsticks has been upheld, *Haleston Drug Stores* v. *NLRB*, 187 F. 2d 418 (9th Cir. 1951), and has been recognized in a dictum by this court in *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 94 L ed. 1284 (1951) where it was said:

"Even when the effect of the activities on interstateinterstate commerce is sufficient to enable the Board to take jurisdiction of a company, the Board sometimes properly declines to do so, stating that the policy of the Act would not be effectuated by its assertion of jurisdiction in that case." p. 684.

In 1954, effective July 1 and July 15 of that year, the National Board made an announcement of a revision of its yardsticks which affected its discretion to exercise its jurisdiction. In that press release the Board stated:

"The National Labor Relations Board today announced seven changes in its standards for determining whether the Board will take jurisdiction of a case. The earlier standards were adopted in October, 1950. The Board has discretion in which cases of those affecting interstate commerce it will exercise jurisdiction."

An account of the basis for the 1954 changes and a defense of the position of a majority of the Board

is contained in *Breeding Transfer Company*, 110 NLRB 493, 35 L.R.R.M. 1020, 1021 as follows:

> "Early this year, the Board undertook to study and reappraise the 1950 jurisdictional standards in the light of the Board's experience since their adoption and also in the light of changing economic conditions. Based upon that study and reappraisal, it is our opinion that the jurisdictional standard enunciated in Red Cab, Inc. should be revised so that the Board's long-established policy of limiting the exercise of its jurisdiction to enterprises whose operations have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce can be better attained.
>
> * * * *
>
> "The fact is that this Board, since the earliest days of the Wagner Act, has operated on the premise, which has Court and Legislative approval, that the Board has discretion to determine the circumstances under which it will exercise its jurisdiction over labor disputes. Prior to 1950, this discretion was exercised on a case-to-case basis, but it is a matter of history that the Board for years refused to assert jurisdiction over many establishments, such as retail stores, hotels, restaurants, taxicabs, local transit companies, and even the entire construction industry. In 1950, this *ad hoc* basis of exercising jurisdiction was abandoned in favor of a codified jurisdictional plan—adopted without a dissenting voice on the Board—which imposed fixed dollar volume limits upon the enterprises over which the Board would assert its jurisdictional power. This 1950 plan, like the present one, drew a line short of the legal limits of the Boards jurisdiction.

It was only after this latest revision of its yardsticks that the National Board declined to assert its jurisdiction over the unfair labor practice charges

filed with it by the United Steelworkers against Photo Sound.

The true nature of this exercise of discretion not to act was made clear by the First Circuit in *NLRB* v. *Kobritz, etal,* 193 F. 2d 8 (1st Cir., 1951). In that case the employer contended that because the Board had declined to assert jurisdiction in the past, it could not now do so in the application of a different administrative policy. The court said:

> "*The simple answer to this is that the Board has jurisdiction all the time. National Labor Relations Board* v. *Jones and Laughlin,* 301 U.S. 1. The Board's exercise of discretion here does not enlarge or exceed its jurisdiction so as to prejudice this respondent, since the acts complained of, if proved, would violate the act and redress can be procured under it." p. 138.

cf. *U.S.* v. *Morton Salt Co.* 338 U.S. 652, 647, 94 L ed 501 (1949)

While the Board has some discretion as to whether it should exercise its power to the full extent that Congress has granted it, there are limits on that discretion that make it clear that the boundaries set by the self-imposed yardsticks are not fixed and that its exclusive jurisdiction is a continuing one. These yardsticks must be "correct" in evaluating the impact of the dispute on interstate commerce. *Joliet Contractors Assoc.* v. *NLRB,* 193 F. 2d 833 (7th Cir. 1952). The board may not abandon a proceeding in midstream because of its changed jurisdictional standards so as to leave stranded an employee who testified in response to the Board's subpoena. *Pedersen* v. *NRLB* 234 F. 2d 417 (2nd Cir. 1956). Nor may it control its discretion by standards that are arbitrarily fixed,

but it must hear the complainant on the validity of the standard as applied to a particular case. *Street Ry. Employees* v. *NLRB*, ...F. 2d ...., 39 L.R.R.M. 2001 (D. C. Cir. 1956).

While for some statutory reasons the Board may not act in a particular case, nevertheless, the door is not open to state jurisdiction. (*Local Union #25*, v. *New York, N. H. & H. R. R.*, 350 U.S. 155, 100 L ed. Adv. 164 (1956), *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 100 L ed. Adv. 514 (1956). As stated by this Court in the latter case:

> "Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.
>
> "The industrial relations between the company and its employees nonetheless affect interstate commerce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." 100 L ed. (adv.) p. 521.

These cases all make it clear that the national Act applies all the time to unfair labor practices affecting interstate commerce and that the complainant is not foreclosed merely by the action of the regional director in refusing to issue a complaint because of a change by the Board in its yardsticks. The Steelwork-

ers Union in the case at bar did not pursue the invitation to appeal the dismissal within the Board's administrative procedure, much less seek court review. Instead, it asked the Utah Board to assert its jurisdiction—a jurisdiction appellant contends does not exist.

Congress, when it revised the Wagner Act by enacting the Labor Management Relations Act in 1947, was not unaware of the problem created by the National Board's attempt to self-limit the exercise of the broad power granted it by Congress and the implications of such policy created by the decision of this court in the *Bethlehem Steel* case.

As pointed out by this court in *Amalgamated Assoc. of Street, Electric and Railway Employees* v. *WERB*, 340 U.S. 383, 95 L ed. 364 (1951):

> "When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234, 67 S. Ct. 1026 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers in so far as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare

invalid state regulation which impinges on that legislation." 340 U.S. 383, 397.

In the first place, no change was made in the broad jurisdictional language of the 1935 act which this court has held was coextensive with the constitutional power of Congress over commerce. *NLRB* v. *Fainblatt*, supra. It specifically did not set quantitative limits to the act's coverage such as the Board has used in the development of its self-restrictive yardsticks.

In the second place, the general language of the proviso to section 10 (a) referring to labor disputes affecting interstate commerce, but occurring in industries "predominantly local in character"—the very field in which the Board has, for budgetary reasons, declined to act (*Breeding Transfer Co.*, supra) indicates Congress intended to continue the application of the National Act in such fields. No statutory provision for ceding jurisdiction would have been necessary if the federal law did not extend coverage to the full extent of its constitutional power. Congress having made a "legislative affirmative description" of the method wherby jurisdiction could be ceded to the states, a denial of any other method is implied. *Continental Casualty Co.* v. *U.S.*, 314 U.S. 527, 86 L ed. 426 (1942).

In section 10 (a) of the 1947 act, Congress dealt with the situation expressly. As this Court has pointed out in *Algoma Plywood & Veneer Co.* v. *WERB*, 336 U.S. 301, 313, 93 L ed. 691 (1949), the purpose of the proviso in section 10 (a) was:

"* * *to meet situations made possible by

Bethlehem Steel Corp. v. *New York State Labor Relations Bd.* 330 U.S. 767, 91 L ed. 1234, 67 S. Ct. 1026, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H.R. Rep. No. 245, 80th Cong. 1st Sess. 40; S. Minority Rep. No. 105 p. 2, 80th Cong. 1st Sess. 38."

The decision in the *Bethlehem* case was handed down on April 7, 1947. Ten days later, the Senate Committee reported out S. 1126, containing the following proviso to section 10 (a).

> Provided, that the Board is empowered by agreement with any agency of any State or Territory to concede to such agency jurisdiction over any cases in any industry, other than mining, manufacturing, communications, and transportation, except where predominantly local in character even though such cases may involve labor disputes affecting commerce, provided the State agency conforms to national policy, as herein defined, in the determination of such disputes."

In conference, the word "concede" was changed to "cede" and the phrase "provided the State agency conforms to national policy, as herein defined, in the determination of such disputes", was changed to read: "unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The Senate Report stated (S. Rep. No. 105 on S. 1126, p. 26): "Section 10 (a): The proviso which has been added to this subsection permits the national Board to allow State labor-relations boards to take

final jurisdiction of cases in border-line industries (i.e., border line insofar as interstate commerce is concerned), *provided the State statute conforms to national policy.*" In the same report, the minority of the Committee said (p. 38):

> "(c). Concessions of Federal jurisdiction to States.—Section 10 (a) adds a proviso to the present act empowering the Board to concede to any agency of any State or Territory jurisdiction over any cases not predominantly national in character even though such cases involve an affect upon interstate commerce. We agree with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems. This proposal is made necessary by the decision of the Supreme Court in *Allegheny Ludlum Steel Corp.* v. *William J. Kelley and H. Myron Lewis*, etc. decided on April 7, 1947 (330 U.S. 767).

The minority report went on to say "we think the clarification of relations between the Federal and State boards, contemplated under section 10 (a) a wise solution to a complex problem." (S.R. 105, Part II, p. 41, to accompany S. 1126, 80th Cong. 1st Sess.) In conference the Senate version of section 10 (a) was adopted. The Report of the Conference Committee, H. R. Rep. 510, H.R. 3020, 80th Cong. 1st Sess. at p. 52 states:

> (2) The Senate amendment contained a proviso at the end of section 10 (a) authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (a) That it can cede jurisdiction in cases arising in mining, manufacturing, communications, and transportation only when the employer's operations are

predominantly local in character, and (b) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act, as interpreted and applied by the Board and by the courts. The House bill contained no provision corresponding with the proviso of section 10 (a) of the Senate amendment. The conference agreement adopts this proviso."

These statements of congressional intent clearly indicate Congress desired state board action in "borderline industries" only insofar as the state statutes conform to national policy as expressed in the national act "in order to provide for uniformity in matters of national policy under the commerce clause". H.R. 245 on H.R. 3030, at p. 40.

As stated by this Court, one of the primary purposes of the framework of the national act was to minimize conflicts likely to result from variances of local procedure and attitudes toward labor controversies. *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L ed. 228 (1953).

Other examples of express congressional concern as to the role the states were to play in the area of labor relations regulations are section 8 (d), providing for notice to state mediation and conciliation agency in event of contract termination, section 14 (b) authorizing the so-called "right to work" legislation, section 202 (c) authorizing the director of the Federal Mediation and Conciliation Service "to establish suitable procedures for cooperation with state and local mediation agencies" and section 203 (b) directing such director "to avoid attempting to mediate disputes

which would have only a minor effect on interstate commerce if state or other comparable services are available to the parties."

No such direction is made to the National Board to abdicate its jurisdiction over unfair labor practices in favor of state agencies. The National Board may cede such jurisdiction only pursuant to the provisions of section 10 (a). If the Board's contraction of its activities by lengthening its yardstick gives the Utah Board power to act, it means that the National Board can do by abdication that which Congress has prohibited by agreement. It is submitted that no such result was intended by the Congress.

That this analysis of the national act is correct was confirmed by the decision of the Court of Appeals for the Tenth Circuit in *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659, (10th Cir. 1955) when that court said:

> "Moreover, the refusal by the NLRB to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby revesting the state court with authority to proceeed. Amended Section 10 (a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. *Unless and until there is an express ceding of jurisdiction to a proper state agency, exclusive jurisdiction remains in the federal agency.* For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly preempted by Congress." (emphasis supplied).

To the same effect is the decision of the court in

the Ninth Circuit in *Capital Service, Inc.* v. *NLRB* 204 F. 2d 848 (9th Cir., 1953) that "we construe this amendment [to section 10 (a)] as giving to a state the right of enforcement only by an agreement reached by it with the Board. 204 F 2d 848, 855. (emphasis supplied)

It is further submitted that the language of section 10 (a) as thus construed with respect to New Mexico and California, where no state board exists, applies *a fortiori* to a state like Utah with a state board and a state labor relations act. It might well be argued that if the National Board refused to act by reason of its budgetary yardsticks, a state court in the exercise of its historic equity jurisdiction to grant relief where no other adequate remedy at law was available, might take jurisdiction to fill the void, subject, of course, to the limits prescribed by this court in *Weber* v. *Anheuser-Busch,* supra.[1] But a state board is proscribed expressly by section 10 (a) unless the state act spelling out its powers and the state policy on labor relations is consistent with the corresponding provisions of the national act and the National Board has ceded jurisdiction.

As this court pointed out in *Algoma Plywood* v.

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(1) Comparison should be made in this connection with *Garmon* v. *San Diego Building Trades Council,* 45 Cal. 2d 657, 291 P. 2d 1 (1955), cert. granted May 7, 1956, No. 50, October Term, 1956. There the California court asserted its jurisdiction when the National Board refused to act by reason of its jurisdictional yardsticks. The California court went on to find the union conduct a violation of section 8 (b) (2) of the National Act, (29 U.S. C. 158 (b) (2)) and granted an injunction. Thus the California Court applied the National Act. In the case at bar the Utah Board found the activities affected "intrastate commerce or the ordinary operation of industries within the State of Utah (R. 19)—the jurisdictional language of the Utah statute (34-1-10 (a), Utah Code Annotated, 1953) and applied the State Labor Relations Act even though the National Act is controlling. *United Mine Workers* v. *Arkansas Oak Flooring,* 351 U.S. 62.

WERB, supra, the phase "not consistent with the corresponding provisions of this Act" in the proviso "must mean that cession of jurisdiction is to take place only where state and federal laws have parallel provisions." 330 U.S. 313.

Congress apparently designed this provision as a club to induce state legislatures to correlate their acts with the national policy as set forth by Congress in the national act. Until the state legislature does so, the state board cannot succeed to the jurisdiction of the National Board. In the face of such a congressional mandate, the National Board cannot let in through the back door the state board which Congress barred through the front. Any other interpretation of section 10 (a) would render its proviso meaningless.

It is clear that this case does not come within the situation described in *Weber* v. *Anheuser-Busch*, supra, as an area "not susceptible of determination by fixed metes and bounds", nor as described in *Garner* v. *Teamsters*, supra as one in which "Congress has refrained from telling us". Here Congress has spoken expressly. State boards may not act unless the proviso of section 10 (a) is met. Utah has not modified its labor relations act to meet the requirements of Congress. Therefore, the Utah Board is precluded by the supremacy clause of the Constitution from acting in this case.

C. THE NATIONAL LABOR RELATIONS ACT HAS PRE-EMPTED THE FIELD.

In the case decided only last term, *Pennsylvania* v. *Nelson*, ...U.S. ...., 100 L ed. Adv. p. 415 (3rd Cir.

1956), this Court laid down the criteria, to be considered in determining whether in a given case, Congress has "prempted the field". It is submitted that applying these criteria in light of the past decisions of this court as to the federal-state relationship in the labor relations field, and in light of the express language of the Labor Management Relations Act, clearly indicates that the Utah Board is precluded in the instant case from asserting any jurisdiction.

The first test proposed in *Pennsylvania* v. *Nelson*, is whether "the scheme of Federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Rice* v. *Santa Fe Elevator Corp.* 331 U.S. 218, 230, 91 L ed. 1447 (1947).

We are, of course, in this context discussing the protection of both labor and management from the unfair labor practices of the other. Congress, in 1935, determined that it was necessary to enter the field of labor relations and with the Wagner Act set up an extensive administrative program for the protection of organized labor from discriminatory and coercive practices of management. It gave the Board authority to administer the program with powers coextensive with the constitutional power over interstate commerce. *NLRB* v. *Fainblatt*, supra. Among the specific acts prohibited both before and after the 1947 amendments, were coercion and other interference with the right of union membership (section 8 (a) (1)), discharges of those active in union affairs (section 8 (a) (3)) and refusal to bargain collectively (section 8 (a) (5)). These are the very acts with

which appellant was charged in both the NLRB proceeding (R. 2) and the state proceeding (R. 5). The statutory scheme for charge, investigation, hearing and appeal before the National Board and court review in the Court of Appeals, leaves no room for any supplementary action by the state in areas affecting interstate commerce. There can be no question that such a comprehensive and exclusive program of administrative action by the National Board meets the requirements of due process. *Myers* v. *Bethlehem Shipbldg. Corp.* 303 U.S. 41, 48, 82 L ed. 638 (1942). The only "room for supplement" could possibly come when the National Board, for budgetary or other internal reasons declined to assert its power and there Congress has spoken expressly with respect to the method of opening the door to state board action. It may come only if the proviso of section 10 (a) is met.

This court has already pointed out other areas where room is left for state action. In *Algoma Plywood & Veneer Co.* v. *WERB*, 336 U.S. 301, 93 L ed. 691 (1949), this court allowed the Wisconsin Board to act where no "parallel provisions" as to maintenance of membership clauses appeared in the national act. In *United Construction Workers* v. *Laburnum Constr. Co.* 347 U.S. 656, 98 L ed. 1025, (1954) this court allowed an action for damages based on violent conduct which the state court found to be a common law tort. In *United Automobile, Aircraft and Agricultural Implement Workers* v. *WERB*, 351 U.S. 266, 100 L ed. Adv. 666 (1956) this court recognized the power of the state board to stop violence or other injurious conduct which the court found the National Board was

without express power to regulate. In *International Union* v. *WERB*, 336 U.S. 245, 93 L ed. 651 (1949) this court upheld a state injunction against recurrent work stoppages on the ground that such conduct was neither prohibited nor protected by the national act and left open to state control.

With respect to unfair labor practices defined in the national act, this Court said in *Garner* v. *Teamsters, C & H Union*, 346 U.S. 485, 490:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * *"

The second test set forth in *Pennsylvania* v. *Nelson* is whether the Federal statute "touch [es] a field in which the Federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject." Congress itself, in section 1 (b) of the Labor Management Relations Act of 1947, stated its policy as follows:

> "(b) Industrial strife which interferes with the normal flow of commerce and with the

full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interferenc by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

and summed up its policy in the last paragraph of section 1 of the National Labor Relations Act as amended, as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

As said by this court in *Weber* v. *Anheuser-Busch*, supra:

> "Controlling and therefore superseding federal power cannot be contemplated by the state even though the grounds for intervention be different than that on which federal supremacy has been exercised."

and in *Amalgamated Assoc. of Street, Electric & Ry. Employees AFL* v. *WERB*, 340 U.S. 416 (1951), this Court said:

> "When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234, 67 S. Ct. 1026 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states.[1] Congress knew full well that its labor legislation 'preempts the field that the act covers in so far as commerce within the meaning of the act is concerned'[2] and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation."

The action of this Court with respect to certification of unions in *Bethlehem Steel Co.* v. *New York*

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(1) Section 10 (a) of the 1947 Act, 29 U.S.C. (Supp. II) § 160 (a). A proviso of § 10 (a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong. 1st sess. 26 (1947). See also Minority views to same report, id. pt. 2 38, agreeing as to this feature of the legislation.

(2) H.R. Rep. No. 245, 80th Cong. 1st sess. 44 (1947).

State Labor Relations Board, supra, and in *LaCrosse Telephone Company* v. *WERB*, supra, and with respect to prevention of unfair labor practices in *Plainton Packing Co.* v. *WERB*, supra, re-enforces this position of dominance of the federal act.

The third test in *Pennsylvania* v. *Nelson* is that "enforcement of state * * * acts presents a serious danger of conflict with the administration of the federal program."

Heretofore this Court has recognized the preemption of the federal act where possibility of conflict might exist. It pointed out in the *Garner* case, supra:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." 346 U.S. 485 at 491;

and in the *Laburnum* case, supra, in referring to *Garner* v. *Teamsters*, supra, it was said:

> "To the extent that Congress prescribed preventative procedure against unfair labor practices, that case recognized that the act excluded conflicting state procedure to the same end." 347 U.S. 656, 665.

We have already demonstrated the differences between the federal and Utah acts dealing with unfair labor practices, and the rights and obligations of both union and management with respect to board protection. To prevent such conflicts, Congress enacted the proviso to section 10 (a). That proviso alone satisfies all three criteria of *Pennsylvania* v. *Nelson*. Until the requirements of that proviso are met, the National Board is the only body authorized by Congress to deal

with the prevention of unfair labor practices in an industry affecting interstate commerce.

POINT III

THE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT CONTROL THIS ACTION, NOT THE ADVERSE AFFECTS OF THE NATIONAL BOARD'S JURISDICTIONAL YARDSTICKS

The Utah Supreme Court, in its decision below, indicated that its solution of the issue was motivated by the fact that "the values of immediate legal supervision of labor controversies within this company can only be maintained through state action" (R. 33).

In the present posture of the federal and state acts, such result is unfortunately true. The Utah Board found that five men had been discharged by appellant for union activities and that appellant had failed and refused to negotiate in good faith with the Steel Workers union as the representative of his employees (R. 19-20). If the state board cannot act and the national board will not act, no administrative remedy may exist to correct this situation. But that unfortunate result lies not at the door of either party to this action. Nor does such result warrant ignoring the plain import of the federal act.

The blame properly rests on the shoulders of Congress, the Utah Legislature and the National Labor Relations Board. Action by any one of them could have prevented the no-man's land of jurisdiction. This hiatus between the furthest reach of federal power over commerce granted by the federal act and the self-imposed restrictions enunciated by the National Board in its "jurisdictional yardsticks" was apparent from

the time of the decision of this court in *Bethlehem Steel* v. *N. Y. Labor Relations Board*, 330 U.S. 767 (1946). Congress met the problem with the proviso to section 10 (a) which even the minority report called "a wise solution to a complex problem." Since 1947, the Utah Legislature has had ten years in which to make its act consistent with the federal act so that the Utah Board could be ceded jurisdiction in the State of Utah. The Utah Legislature has done nothing to meet this situation.

In 1950 the National Board changed from the *ad hoc* basis of determining jurisdiction to the formula of jurisdictional yardsticks.

The enhanced dangers of the "jurisdictional tidelands" has since been pointed out in numerous legal articles,[1] and the problem was posed but not decided by this court in *Building Trades Council* v. *Kinard*, 346 U.S. 933, 98 L ed 423 (1954).

Despite such indications that this no man's land existed, the National Board, by lengthening its yardsticks in 1954 made the tidelands area, where no curbs on do-it-yourself management tactics existed, even larger.

Prof. Cox, in his article "Federalism in the Law of Labor Relations" 67 Harv. L. Rev. 1297, 1345, suggests that allocation of responsibility can best be made through inter-governmental agreements negoti-

(1) See Feldblam "Jurisdictional Tidelands in Labor Relations," Feb. 1952, L.L.J. p. 114; Cox and Seidman "Federalism and Labor Relations" 64 Harv. L. Rev., p. 211; Cox, "Federalism in the Law of Labor Relations," 67 Harv. L. Rev., 1297; Humphrey "The Changing Jurisdictional Standards of the National Labor Relations Board," 15 Fed Bar J. p. 30; Whitney, "NLRB Jurisdictional Policy in the Federal-State Relationship," Jan. 55 L.L.J. p. 3; Roche and Hanslow, "NLRB Absolutism - A Dogma Re-Visited," May, '55, L.L.J. p. 279. Turnbull, "Federal-State Jurisdictional Problems," Jan. '56, L.L.J. p. 5.

ated by the agencies concerned, similar to the type discussed in Mr. Justice Frankfurter's separate opinion in the *Bethlehem Steel* case. This, of course was the basis of the solution set up by Congress in section 10 (a) but with the additional proviso to insure a uniform national labor policy in areas affecting interstate commerce. Utah, in failing to meet the national policy, has only itself to blame.

Of course, the prime responsibility rests with the National Board in the establishment of its jurisdictional policy. Before abdicating its responsibility, it should have placed squarely before the Congress the alternative of increasing the Board's budget to meet the obligations placed upon it by the National Labor Relations Act, or of amending section 10 (a) to permit cession to the states.

Congress has, in fact, given consideration to the problem. Several attempts have been made to relieve the strict conditions of section 10 (a) on the freedom of the National Board to cede jurisdiction.[1]

The Senate Labor Committee, acting upon the recommendation of President Eisenhower, embodied the following provision in a proposed bill to amend the Taft-Hartley law.

> "Sec. 6 (b) (1) The Board, in its discretion, may decline to assert jurisdiction over any labor dispute where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. (2) Nothing in this Act shall be deemed to prevent or bar any agency, or the courts of any State or Territory, from assuming

(1) See S 1264, 83rd Cong. 1st sess.; S 2218, 83rd Cong. 1st sess.; S. 2650, 83rd Cong. 2nd sess.

and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." (See S. Rep. No. 1211 on S.B. 2650, 83rd Cong. 2nd Sess. 28 (1954).

It is submitted that some such congressional action is the only solution. While results in individual cases may seem inequitable, such result is what Congress has ordained. It has deemed a uniform national policy more important than the risks incident to a jurisdictional no-man's land. Whether such determination is sound is, of course, not for this court, but for Congress to determine. Regardless of its limits on cession, the national law controls the situation, and the commerce and supremacy clauses of the Constitution preclude the application of state law.

On the other hand, consideration must be given to the adverse affects of a disregard of the requirements of section 10 (a) in yielding, as the Utah Supreme Court did, to the equities of a particular case. This would mean, of course, that Company A in Utah, whose volume of business was just over the top of the yardstick scale used by the National Board, would have its actions regulated by that Board. On the other hand, Company B whose volume is only a little less, would be subject to the Utah Board and the Utah act. Company B for example, would be subject to strike at the drop of a hat, while Company A would enjoy the protection of the sixty day notice requirement of the national act. Company A would have the protection against a communist dominated union given by section 9 (h) of the national act, while Company B might be required by the Utah Board, under the Utah

act, to bargain with such a union.

Consider also the interests of the employees of Company B. If they have a union shop contract, their employer could be forced to discharge them if their union membership was terminated because of some intra-union quarrel. Company A employees could be terminated for loss of union membership only for failure to pay dues. Under such circumstances which competitor will enjoy the more favorable labor relations? Certainly a work stoppage in Company B would just as much affect the free flow of commerce as one in Company A even though that flow was less in dollars.

In the second place, how long would the jurisdiction of the Utah Board last over Company B? The case at bar shows how, in a period of a few months, the National Board exercised jurisdiction to conduct a representative election, changed its standards and declined to assert jurisdiction over an unfair labor practice claimed to have arisen out of that very election. The confusion likely to result was pointed out by the Court of Appeals for the Tenth Circuit in *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659 (10th Cir. 1955) by quoting the following from *Universal Car and Service Co.* v. *IAM*, 35 L.R.R.M. 2087 (Mich. Cir. Ct., 1954):

> "If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political view at the moment, then neither the courts nor the

litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision." (p. 2098)

This Court need not decide which policy is preferable for Congress has made that choice for us. Section 10 (a) prescribes the only way in which jurisdiction over industries affecting interstate commerce can be ceded to a state board. Unless and until those requirements are met, the commerce and supremacy clauses of the Constitution preclude state action in this case.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Supreme Court of Utah is contrary to the provisions of section 10 (a) of the National Labor Relations Act, as amended, and the application of Utah law to the adjustment of an unfair labor practice in an industry affecting interstate commerce is contrary to the commerce and supremacy clauses of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

Comparison of 34-1-8, Utah Code Annotated, 1953, with Title 29, § 158, U.S.C.A.

State (Unfair labor practices) Federal

34-1-8, UCA, 1953	Title 29, §158 U.S.C. (Sec. 8)
(1) It shall be an unfair labor practice for an employer, individually or in concert with others:	(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
(a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 34-1-8.	(a) It shall be an unfair labor practice for an employer—
(b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; provided, that subject to rules and regulations made and published by the board pursuant to 34-1-7(a) an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.	(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
(c) By discrimination in regard to	(3) by discrimination in regard to hire or tenure of employment or any term or condi-

hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; provided, that nothing in this act shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 34-1-10 (a), in the appropriate collective bargaining unit covered by such agreement when made.

tion of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election

(d) To refuse to bargain collectively with

held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided* further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate

the representative of a majority of his employees in any collective bargaining unit; provided, that when two or more labor organizations claim to represent a majority of the employees in the bargaining unit the employer shall be free to file with the board a petition for investigation of certification of representatives and during the pendency of such proceedings the employer shall not be deemed to have refused to bargain.

(e) To bargain collectively with the representative of less than a majority of his employees in a collective bargaining unit.

(f) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 34-1-8, or to

against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules

intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 34-1-8, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To cooperate in engaging in, promoting,

with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course

or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(d) To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(e) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion, or sabatoge, the obtaining, use or disposition of materials, equipment, or services; or to combine or conspire

of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if any other labor organization has been certified

to hinder or prevent the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(f) To take unauthorized possession of property of the employer.

as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

(5) to require of employees covered by an agreement authorized under subsection (a)

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1) and (2) of this section.

(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force

or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate, disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the

terms and conditions of the existing contract, for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified

in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Comparison of 34-1-9, Utah Code Annotated, 1953, with Title 29, § 159, U.S.C.

34-1-9 UCA, 1953	29 U.S.C.A. § 159 (Sec. 9)
(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer.	(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for th purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.
Appropriate Unit.	
(b) The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of this act, the	

unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Questions Affecting Intrastate Commerce.

(c) Whenever a question affecting intrastate commerce or the orderly operation of industry arises concerning the representation of employees, the board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 34-1-10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Review - Transcript.

(d) Whenever an order of the board made pursuant to section 34-1-10 (c) is based in whole or in part upon facts certified follow-

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranted by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit; is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes together with other employees, any individual employed as a guard to enforce a-

ing an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 34-1-10 (e) or 34-1-10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

gainst employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or its affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) as-

sert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160 (c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selec-

tion between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to

be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the pre-

ceeding twelve-month period, a valid election shall have been held.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b), of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and

allowance of its three principal officers and of any of its officers or agents whose aggregate compensation and allowances for the preceding year exceed $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year; (3) the manner in which the officers and agents referred to in clause (2) of this subsection were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on

membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (1) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial re-

port required by paragraph (1) of this subdivision to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or con-

stituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor orgarization and the officers of any national or internationl labor organization of which is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal

34-1-10, UCA, 1953

(a) The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 34-1-8) affecting intrastate commerce or the orderly operation of industry. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.

or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Title 29, § 160 (a) (See 10 (a))

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute

applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 280

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

vs.

UTAH LABOR RELATIONS BOARD,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLEE

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Appellant,

vs.

UTAH LABOR RELATIONS BOARD,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLEE

STATUTES INVOLVED

Appellant has referred to Sections 8, 9 and 10 (a) of the National Labor Relations Act, 61 Stat. 146, 29 U. S. C. 158-160 (a), and Sections 34-1-8 and 9, Utah Code Anno-

tated 1953, as being involved in this case. Insofar as it is necessary to meet appellant's argument, the federal statute is referred to herein, and the Utah law noted as being the basis upon which relief was granted.

THE QUESTION PRESENTED

The single question presented before this court for decision is whether the Utah State Labor Relations Board may take jurisdiction of a labor matter affecting interstate commerce when the National Labor Relations Board has declined jurisdiction of that matter because of budgetary reasons or upon the basis that the matter is one of local concern.

STATEMENT OF THE CASE

The appellee, Utah Labor Relations Board, is in substantial agreement with the statement of the case as set forth by the appellant. However, the Board is convinced that the public policy considerations involved in this case are of great magnitude and therefore certain portions of the unprinted record are herein made supplemental to appellant's statement. The Intermediate Report of Trial Examiner Robert J. Shaughnessy, as it pertains to the unfair labor practices of appellant and refusal to bargain, follows:

"THE UNFAIR LABOR PRACTICES

"1. THE DISCHARGES

"1. Charles Illsley was employed by the Respondent* in October of 1953. The following month

*At the hearing before the Utah Labor Relations Board Photo Sound Products Manufacturing Company (the Appellant herein) was designated as the Respondent, and United Steel-Workers of America, CIO was designated as the Claimant and Petitioner.

he signed a union authorization card. He became active immediately in promoting the Union among fellow employees. He acted as the Union observer at the time of the N. L. R. B. election. He later became a member of the Union negotiating committee and grievance committee. He participated in virtually all negotiations that were held between the Company and the Union until negotiations ceased. Illsley was discharged in August 1954 after negotiations had broken off and the N. L. R. B. had refused to issue a complaint.

"After the advent of the organization campaign it seems from all the evidence that a general attitude of anti-union conduct developed on the part of management towards the infant union. Negotiations were not satisfactory. The Respondent failed to give proper attention to the request of the Union for meetings or discussions on grievances. Since Mr. Illsley was spearheading the Union movement in all these fields, it follows that because of the general anti-union attitude of the Respondent they were most anxious to see him discharged.

"In point of seniority in his classification he was the oldest employee of the Respondent. His successor was another employee of the Respondent that did not work for Photo Sound but an entirely separate operation that the Respondent maintained elsewhere.

"The Referee finds and concludes that Charles Illsley was discharged solely because of his activities for and on behalf of the complainant Union.

"2. Gary Watrous was employed as a clerk and stock record keeper in the production shop and had been so employed since July 15, 1953. Mr. Watrous had attended a meeting of the Union at which the Respondent's manager, Mr. Garber, spoke. He had met in cars outside Respondent's place of business with the Union Representative, Mr. Mullet, and had been observed by Mr. Garber, who also knew the

occupation and purpose of Mr. Mullet. After obtaining permission for a two-week leave of absence for active duty with the Navy, the applicant found on his return that he had been replaced by someone from some other operation carried on by Mr. Guss. Prior to his departure for the Navy, Mr. Watrous had been questioned by Mr. Gerber as to how he had voted in the election. As will later appear, Mr. Gerber was known as being opposed to the Union.

"The Referee finds and concludes that Mr. Watrous had been discharged for his activities for and on behalf of the Union.

* * * *

"5. Victor Sismondi was employed in October of 1953 and discharged in April of 1954. The management of the Respondent advised him that he had been discharged for sloppy work. Apparently a number of valves were not properly cut and Sismondi was blamed for this error. Sismondi's activities in connection with the Union consisted primarily in signing a union designation card and distributing cards to other employees. He met with the Union Representative on a number of occasions and attended meetings with other employees. His employment lasted seven months. It seems difficult to the Referee to employ a machinist for such a period and at that time discover that he was not qualified to do the job. Such a shortcoming seems reasonable to determine after a few weeks of employment let alone seven months. It would appear that management had knowledge of the fact that Sismondi was a member of the Union and at best picked a poor time to discharge him immediately prior to the election.

* * * *

"3. THE REFUSAL TO BARGAIN

"Following the Certification by the N. L. R. B. the Union requested an immediate meeting for the

purpose of negotiating a contract. A number of letters and phone calls were made, meetings set and cancelled until finally an Unfair Labor Practice Charge was filed with the N. L. R. B.

"Following this a meeting was held on June 1, 1954 in the office of the Respondent's attorney, Peter M. Billings. Mr. Rasmussen, the Union's representative, supplied a proposed contract on behalf of the Union and represented that the matter was open for negotiations. Mr. Rasmussen also provided a proposed interim agreement for handling grievances. The matter was discussed generally with reference to general matters in the contract.

"Another meeting was held June 23, 1954 and at this meeting the interim agreement for handling grievances was signed. Shortly thereafter, the Respondent's attorney left town and did not return until August 11, 1954 at which time he found a letter from the Union requesting a meeting either the 11th, 12th or 13th of August. At the same time, the Respondent and his Attorney received word from the N. L. R. B. that they would not assume jurisdiction of the unfair labor practice charge previously filed by the Union.

"In the face of a request for a meeting to negotiate the contract by the Union on any one of three days, the Respondent ignored the request and by Counsel's own statement decided 'that the Steelworkers were dropping the matter of negotiation, because we had no further request.' From this time on, in spite of an open request for bargaining sessions, the Respondent made no further effort to contact either the Steelworker's Union or a member of the negotiating committee of Respondent's place of business.

"The Trial Examiner can only conclude that after the N. L. R. B. decision, the Respondents had no further intention of meeting or attempting to negotiate a contract. It must also be found that the

request for meetings were reasonable as to number, time and place. For these reasons the record supports a finding that the Respondent has since on or before refused to bargain collectively with the duly designated representative of their employees." (Unprinted portion of the record, pages 0022-0026.)

The Utah Labor Relations Board, on June 21, 1955, affirmed the Trial Examiner's rulings and adopted as its own the findings of facts as made in the Intermediate Report and Recommended Order (R. 18-21). The importance of the facts in this case, particularly the unfair labor charges and the refusal to bargain, become even more striking in view of the recent reversal of position by the United Steelworkers of America as set forth in its brief *amicus curiae*.

SUMMARY OF ARGUMENT

I. A plethora of authority sustains the proposition that federal labor legislation has not totally pre-empted the field of industrial relations involving interstate commerce and that the National Labor Relations Board does not have exclusive jurisdiction over those labor matters. In *Weber* v. *Anheuser-Busch*, 348 U. S. 468, this court concluded that the Taft-Hartley Act did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause, and that much had been left to state jurisdiction. Recent precedent of this court points up important areas in which in-roads have been made upon federal preemption in the field of labor relations. See for example *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656; *United Automobile, Aircraft*

and Agricultural Implement Workers v. *Wisconsin Employment Relations Board*, 351 U. S. 266, 100 L. Ed. Adv. 666.

The appellant argues that the National Board has exclusive jurisdiction over the labor dispute involved in this case and cites as authority *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767; *LaCrosse Telephone Company* v. *W. E. R. B.*, 336 U. S. 18, and other cases in which federal and state legislation or action conflicted. The rationale upon which this court precluded state jurisdiction in those cases is inapplicable here. This case does not involve a direct or positive conflict of state and federal power, nor a contest between the National Labor Relations Board and the Utah Labor Relations Board to ascertain which is the master of a given labor dispute.

The exercise of state police power is superseded only where the repugnance of conflict between state and federal action is so direct and positive that the action of each cannot be reconciled. *Kelly* v. *Washington*, 302 U. S. 1. Inasmuch as this case involves no irreconcilable conflict of federal and state action, this state has jurisdiction to deal with local exigencies and to exert an essential protective power.

II. If the Federal government has occupied a given field of supervision, a state may nevertheless exercise control until the agency charged with enforcing the statute or regulation acts in pursuance of that authority. *Missouri Pacific R. R.* v. *Larabee Flour Mills*, 211 U. S. 612; *Northwestern Bell Telephone Co.* v. *Nebraska State R. R. Commission*, 297 U. S. 471; *Welch Company* v. *New Hampshire*, 306 U. S. 79.

It would seem a fortiori that where a federal agency has affirmatively declined jurisdiction over a labor matter, the arguments for allowing state action would be even more convincing than in a case where federal administrative action might have been taken but was not. When an affirmative declination is made, it is certain that the Federal government does not intend to occupy the area in question and the necessity for state jurisdiction becomes even more apparent when the public health, safety and welfare are involved.

This case is one in which federal power has been delegated but lies dormant and unexercised. *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767. The National Labor Relations Board in promulgating its yardsticks, and in this case declining jurisdiction, has defined the limits of congressional jurisdiction in the particular area. The Board's standards should be given the same effect in defining the limited area to be covered by the federal statute as they would have been accorded had they been included in the Federal Act at the time of its enactment.

III(A). It is conceded that there has been no cession of jurisdiction from the National Labor Relations Board to the Utah State Labor Board pursuant to Section 10(a), Labor Management Relations Act, 1947, and under the circumstances of this case cession is not necessary.

Authority of this court holds that federal pre-emption must be clearly manifest or implied from the nature of the federal legislation. *Reid* v. *Colorado*, 187 U. S. 137; *Napier* v. *Atlantic Coastline R. R. Company*, 272 U. S. 605. There is no such manifestation or implication found on the face of the legislation in question.

The 1947 proviso to Section 10(a) was enacted to clarify the status of cession agreements between the national and state labor boards as a result of doubt created by *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767. This conviction is sustained by *Algoma Plywood Company* v. *Wisconsin Employment Board*, 336 U. S. 301. It cannot be concluded, therefore, that Congress intended to preclude state jurisdiction in the case at hand, or that Section 10(a) is in any way applicable to the situation. Section 10(a) was intended to apply to those labor relations where the Board consistently asserts its jurisdiction, but where a state agency through a cession agreement would be available to assume a part of the burden.

A presumption exists in favor of state authority to act in labor disputes of this kind and any indulgence in construction of federal legislation relevant in this case should be resolved in favor of state jurisdiction.

III(B). It is inconceivable that the National Congress intended that a vacuum should result from an application of federal labor legislation, which would be the unfortunate result if state jurisdiction is denied. Labor unions and management have everything to gain by the application of law and order in this field. Historically Congress has been interested in applying law to a given labor dispute and despite party controversy or political theory, the question has never been absence of law, but the nature of law.

The protection and preservation of individual rights to bargain collectively and be free from the infringement of unfair labor practices cannot be over-emphasized. But of equal importance is the consideration of public welfare, health and safety, which have everything to gain by an ap-

plication of law and order in this instance. The state interest in law and order would preclude an interpretation imputing congressional intent to displace state jurisdiction in this matter.

IV. In the case at hand the National Labor Relations Board declined to exercise jurisdiction through its Regional Director. This in effect constituted denial by the Board, or at any rate made further appeal a futile gesture. The primary question at issue is therefore properly raised in this case. *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.

Apart from the particular facts of this case, it is submitted that a state may properly exercise jurisdiction even though there has been no application to the National Board for appropriate relief, if in fact the labor dispute falls without the standards promulgated by the Board as setting forth the area included for regulation.

The purpose behind the adoption of jurisdictional yardsticks by the N. L. R. B. would be frustrated if the Board were called upon to decide every jurisdictional question, inasmuch as the yardsticks themselves define the limits of the Board's jurisdiction pursuant to the discretionary power vested in the agency by the national Congress.

ARGUMENT

POINT I.

THE NATIONAL LABOR RELATIONS ACT HAS NOT TOTALLY PRE-EMPTED THE FIELD OF REGULATING INDUSTRIAL RE-

LATIONS INVOLVING INTERSTATE COMMERCE.

Precedent of this court would (1) sustain the proposition that the Taft-Hartley Act has not totally pre-empted the field of industrial relations even though interstate commerce is involved, and (2) also sustain the resulting *sequitur* that the National Labor Relations Board would *not* have *exclusive* jurisdiction over those relations. We refer specifically to the case of *Weber* v. *Anheuser-Busch*, 348 U. S. 468, its treatment of the federal-state jurisdictional question regarding labor relations, and the following statement by the court:

> *"By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause.* Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner* v. *Teamsters, C. & H. Local Union (US)*, supra. But as the opinion in that case recalled, *the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.'* 346 U. S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation." (Emphasis added.)

Thus far, litigation has spelled out a reservation of state power in important areas of industrial relations involving interstate commerce. In the case of *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, this

court upheld the state's jurisdiction over mass picketing, threats of bodily injury, property damage, obstruction of streets, and the picketing of employees' homes.

State jurisdiction was sustained in the case of *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, which involved recurrent unannounced work stoppages, that conduct being neither prohibited nor protected by the Taft-Hartley Act. A state may forbid enforcement of a maintenance-of-membership clause in an employer-union contract. *Algoma Plywood & Veneer Company* v. *Wisconsin Employment Relations Board*, 336 U. S. 301. In *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656, an employer's action for damages resulting from violent conduct in a labor dispute, granted by a state court, was upheld by this court upon the theory that no relief was available under federal legislation, and therefore no conflict existed between state and federal action.

Recently this court concluded that a state had the power to prevent mass picketing, violence and overt threats of violence, even though such action is defined as an unfair labor practice under Taft-Hartley legislation. *United Automobile, Aircraft and Agricultural Implement Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; 100 L. Ed. Adv. 666.

Appellant presses upon the court the "exclusiveness" of the National Board's jurisdiction (Appellant's Brief, p. 9), and pre-emption under the Taft-Hartley Act, yet with inconsistency admits the inroads on the "exclusiveness" and pre-emption, and cites the *Algoma, Laburnum, United Auto-*

mobile, et al. and *International Union* cases as spelling out "room left for state action." (Appellant's Brief, p. 34.)

In support of federal pre-emption, appellant relies on *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767; *LaCrosse Telephone Co.* v. *W. E. R. B.*, 336 U. S. 18; and *Plankinton Packing Co.* v. *W. E. R. B.*, 338 U. S. 953. However the rationale upon which this court upheld federal action in each of those cases was that of conflict between federal and state action, a rationale without application here.

This principle of "irreconcilable conflict" was stated in the case of *Kelly* v. *Washington*, 302 U. S. 1, as follows:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (*Simpson* v. *Shepard*) 230 U. S. 352, * * * States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. *The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'*" (Emphasis added.)

Applying the foregoing principle of constitutional law to the facts in *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767, this court held that the National Labor Relations Board's refusal to certify a foreman's union precluded state board certification, referring to the relevant state and federal statutes as follows:

> "Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past.
>
> "* * *
>
> "If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here."

In *LaCrosse Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, the court similarly held that conflicting federal-state legislation precluded a state labor board from certifying a bargaining representative on the theory that:

> "A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a

head-on collision. These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme even though it has not yet been applied in any formal way to this particular employer. The problem of employee representation is a sensitive and delicate one in industrial relations. The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."

In referring to the *Bethlehem* decision, the *LaCrosse* court said:

> "* * * We thought the situation too fraught with potential conflict to permit the intrusion of the state agency."

See also *Plankinton Packing Company* v. *Wisconsin Employment Relations Board*, 338 U. S. 953.

Garner v. *Teamster's Union*, 346 U. S. 485, feared the potential conflict there at issue and stated:

> "To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue or that the state's temporary injunction will be dissolved as soon as the federal board acts. But experience gives no assurance of either alternative and there is no indication that the statute left it open for such conflicts to arise."

The case before this court does not involve a direct and positive conflict of state and federal power, nor a contest between the National Labor Relations Board and the Utah Labor Relations Board to ascertain which is the master of a given labor dispute. It is therefore submitted that the ration-

ale upon which state jurisdiction was denied in *Bethlehem*, *LaCrosse*, *Garner* and *Plankinton* is inapplicable here.

At this point it is important to note the distinction between a case where the National Labor Relations Board's determination not to hear a matter is in the nature of a decision, such as in the *Bethlehem Steel* case, and the situation before this court, where the National Labor Relations Board has refused jurisdiction due to budgetary reasons or because the matter is one of local concern. In the former situation, *Bethlehem*, the exercise of state jurisdiction would result in potential conflict. In the latter situation, which is in point here, no conflict exists because the declination to assert jurisdiction by the National Board amounts to a "hands off" action and disconcern as to the outcome of the labor dispute.

See *Raisch Motors* v. *New York Labor Relations Board*, 35 L. R. R. M. 1631; Feldblum, "Jurisdictional Tidelands in Labor Relations", Labor Law Journal, February 1952; Geyls, The National Labor Relations Board Jurisdictional Standards, A Problem in Federalism, XVI Revista Del Colegio De Aborgados de Puerto Rico 31; "Labor Law—Federal-State Jurisdiction—A Pre-Emption Question", 27 Rocky Mountain Law Review 330; "National Labor Relations Board Jurisdictional Standards and State Jurisdiction", 50 Northwestern Law Review 190.

The Supreme Court of the State of Utah, in using a different approach to the problem, found no conflict in this case as follows:

> "In the present case, there are no allegations that either party was deprived of rights which it might have obtained under the federal law had the N. L. R. B. heard the charges presented to it. There are, in

> fact, no intimations that the national Board would have disposed of the matter in a way other than that in which the state board did. No substantive conflicts between the provisions of the Taft-Hartley Act concerning unfair labor practices (29 U. S. C., sec. 158) and the Utah Code (U. C. A. 1953, 34-1-8) have been alleged nor do any appear with reference to the particular charges involved, i. e., discrimination against union employees and refusal to bargain collectively with certified representatives." (R. 33.) (296 P. 2d 733 at 738.)

The National Labor Relations Board unquestionably could have taken jurisdiction of the case at hand. Had it taken such action, the state board admittedly could not have acted under the principle announced in *Kelly* v. *Washington*, 302 U. S. 1. In view of the National Board's declination of jurisdiction and refusal to act in this instance, a further principle of constitutional law as set forth in the *Kelly* decision is applicable, for this court therein held that states are able to deal with local exigencies and to exert in the absence of conflict with federal regulation an essential protective power.

In *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656, this court upheld state jurisdiction where no federal administrative remedy was in conflict with state action, and stated:

> "The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed the state procedure would have survived."

The appellee submits that federal labor legislation has not totally pre-empted the field of industrial relations in-

volving interstate commerce and there is present in this case no irreconcilable conflict of federal and state action that would result in an application of the rule which would preclude state jurisdiction because of such conflict.

POINT II.

EVEN THOUGH CONGRESS HAS CONTROL OVER INTERSTATE COMMERCE AND HAS DELEGATED THAT AUTHORITY TO AN AGENCY, STATE JURISDICTION OVER THAT SUBJECT MATTER IS PRESERVED UNTIL THE AGENCY ACTS.

It has been held that if the federal government through Congress has occupied a given field of supervision, a state may nevertheless exercise control until the agency charged with enforcing the statute or regulation acts in pursuance of that authority. This principle was stated in the case of *Missouri Pacific Railway* v. *Larabee Flour Mills*, 211 U. S. 612, as follows:

> "* * * it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb

> the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. *In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens.* Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. *Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed.*" (Emphasis added.)

See also *Terminal R. R. Assn.* v. *Brotherhood of R. R. Trainmen*, 318 U. S. 1; *M-L-T Railroad* v. *Harris*, 234 U. S. 412.

In *Northwestern Bell Telephone Company* v. *Nebraska State Railway Commission*, 297 U. S. 471, the Congress had conferred upon the I. C. C. jurisdiction over accounts and depreciation rates of telephone companies. Pending action by the Interstate Commerce Commission pursuant to that authority, the state commission had prescribed depreciation rates. In upholding state regulatory power, this court stated:

> "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Con-

gress intended by the amendment to § 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates."

"* * *

"A direction that the Commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction."

In view of the foregoing authority, it would seem a fortiori that where a federal agency has affirmatively declined jurisdiction over a labor matter, the arguments for allowing state action would be even more convincing than in a case where the federal administrative action might have been taken but was not. When an affirmative declination is made, it is certain that the federal government does not intend to occupy the area in question and state control attaches. The necessity for state jurisdiction becomes even more apparent when the public health, safety and welfare are concerned.

In the case of *Welch Company* v. *New Hampshire*, 306 U. S. 79, the I. C. C. pursuant to the Federal Motor Carrier Act, prescribed but did not put into effect, regulations controlling specific periods of continuous driving by operators of common carriers, which regulations conflicted with the New Hampshire state law regulating motor vehicle carriers. Inasmuch as the federal regulations were not in effect, this court upheld state jurisdiction, stating:

"Without so deciding, we assume, so far as concerns the periods of continuous service condemned

by the state commission, that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute. Then, the sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce."

"* * *

"In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed." (Emphasis added.)

The case presently before the court has public policy considerations which demand a mitigation of labor disputes which, if unregulated, would produce an injurious effect on the safety and welfare of the inhabitants of a state. The same policy considerations and legal precedent which resulted in the preservation of state jurisdiction in the *Welch* decision are equally compelling in this case. In *Bethlehem Steel Company* v. *the New York Labor Relations Board*, 330 U. S. 767, this court held that state jurisdiction attaches where federal power has been delegated but lies dormant and unexercised.

"However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, 58 L. Ed. 1312, 34 S. Ct. 829, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered

> by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Teleph. Co.* v. *Nebraska State R. Commission*, 297 U. S. 471, 80 L. Ed. 810, 56 S. Ct. 536. supra; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438, supra. The states are in those cases permitted to use their police power in the interval. *Terminal R. Asso.* v. *Brotherhood of R. Trainmen*, 318 U. S. 1, 87 L. Ed. 571, 63 S. Ct. 420. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute."

Those who attempt to distinguish the case at bar from rules of law set forth in the foregoing cases are met with the inescapable conclusion in *Bethlehem*, that where a declination to exercise full authority does not take on the character of a ruling, state jurisdiction is *not* superseded, and the constitutional principle regarding federal power which has been delegated but lies dormant is applicable. And clearly the declination here is not in the nature of a decision.

It is submitted that action by an administrative agency in effect amounts to action by Congress where Congress has *empowered*, but not directed the agency to act in cases affecting commerce. Under the general rules of "agency", action by the National Labor Relations Board would in this instance be equated to action by the National Congress. The National Board's declination is in fact a "defining [of] the limits of [the Board's] jurisdiction pursuant to the discre-

tionary power vested in [the Board] by the Congress." *Breeding Transfer Co.*, 110 N. L. R. B. 493, at 497.

Furthermore, the National Labor Relations Board in promulgating its yardsticks has in fact marked the extent of congressional jurisdiction in that area. The Board's standards should be given the same effect in defining the limited area to be covered by the federal statute as they would have been accorded had they been included in the federal act at the time of its enactment.

It is interesting to note that the National Board has given no indication that it would resist state jurisdiction in cases where the National Board has declined to exercise its powers because of budgetary reasons or that the matter is of local concern. To the contrary, the National Board's general counsel has asserted:

> "In practice the board never has, and I think I can confidently predict it never will interfere to block state action in a situation where the board chooses to stay its hand because it believes the impact of the activity on commerce would be insubstantial."
>
> "* * *
>
> "Once it is recognized that Congress has authorized the board at its discretion to withhold the full exercise of its jurisdiction, I cannot see any consideration of policy which makes it necessary or desirable to exclude the states from any field that the board properly abnegates in this way."

(See address by N. L. R. B. General Counsel, George J. Bott, May 13, 1954, cited in 34 L. R. R. pages 67-68.)

We therefore submit that where Congress has *empowered* (see Section 10(a)) an agency to act in a given area

but has *not made action mandatory*, the agency acting in pursuance of that authority is in effect drawing the jurisdictional line to be regulated by the federal government; and the area not included for regulation through agency action remains for appropriate state jurisdiction.

POINT III.

IN ENACTING SECTION 10(a) LABOR MANAGEMENT RELATIONS ACT, 1947, CONGRESS DID NOT INTEND TO DISPLACE STATE JURISDICTION OVER THE SUBJECT MATTER INVOLVED HERE.

A. There is neither an express manifestation nor necessary implication that would justify a displacement of state authority.

Section 10(a), Labor Management Relations Act of 1947 provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such

> agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

In a 1954 decision this court quoted an N. L. R. B. memorandum filed at the request of the court, as follows:

> "It is not feasible under the limitations prescribed by the Act to consummate ceding agreements to any states under the proviso." *United Construction Workers* v. *Laburnum Corporation*, 347 U. S. 656, Footnote 2.

The limitations mentioned by the National Labor Relations Board point up the fact that state labor relations laws are sufficiently inconsistent with the Labor Management Relations Act to preclude cessions agreements. The situation mentioned in the memorandum remains unchanged. For a state board's comments on resultant problems, see the discussion of New York Labor Relations Board (1949) Annual Report, 26 Labor Relations Reference Manual 69.

Appellee, therefore, concedes there has been no cession of jurisdiction from the National Labor Relations Board to the Utah State Labor Board, and under the circumstances of this case, cession is not necessary.

There is no clear manifestation in Section 10(a) itself that would indicate legislative intent to supersede state authority in cases where the National Board had declined jurisdiction, no express statement to that effect, nor language to create the necessary implication. Federal pre-emption must be "clearly manifest", *Reid* v. *Colorado*, 187 U. S. 137, or implied from the nature of the federal legislation. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

The proviso in Section 10(a) was enacted to clarify the status of cession agreements between the national and state labor boards as a result of doubt created by *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767. The concurring opinion in that decision stated in part:

> "Apart from the suggestion that the National Board's declination of jurisdiction 'in certain types of cases, for budgetary or other reasons' might leave room for the State in those situations, *the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the authority of the National Board.*" (Emphasis added.)

In order to eliminate the uncertainty created by the majority opinion—at least as interpreted by the concurring members of the court, the proviso was enacted in June of 1947, two months after the decision.

Algoma Plywood Company v. *Wisconsin Employment Relations Board*, 336 U. S. 301, emphasized that the purpose of the proviso was "to meet situations made possible by *Bethlehem Steel Corporation* v. *New York Labor Relations Board*, 330 U. S. 767 * * *"

Clearly the *Bethlehem* case did not pass upon the question presently at hand, for the court therein stated:

> "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem which we do not now decide."

The "situations made possible" by *Bethlehem* were those over which the National Board ordinarily exercised jurisdiction, but in particular instances had entered into cession agreements with certain state boards, the validity of which had in that case been questioned. Such "situations" are not analogous to that presented here. There is a vital distinction between a case where the N. L. R. B. had consented to state jurisdiction through a cession agreement prior to the *Bethlehem* case, and the situation where the National Board has refused jurisdiction because of lack of funds or the local character of the industrial relation. Section 10(a) was enacted to clarify the former "situation" only.

The *Bethlehem* decision specifically reserved the issue at hand, and the concurring opinion therein interpreted the decision as suggesting that the National Board's declination of jurisdiction in certain types of cases, for budgetary or other reasons would leave room for state jurisdiction. The court in *Garner* v. *Teamster's C & H Union*, 346 U. S. 485 (1953), held there was no "suggestion that respondents plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal board would decline to exercise its powers once its jurisdiction was invoked." As recently at 1954, the United States Supreme Court in the case of *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, held in a per curium decision:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the court does not pass upon the question suggested by the opinion below on whether the State court could grant its own relief should the Board decline to exercise its jurisdiction."

The two latter cases were decided after the enactment of the 1947 proviso to Section 10(a), implying that the proviso in question clearly did not preclude state jurisdiction, or resolve the issue.

It is submitted that the proviso of Section 10(a) was intended to apply to those labor relations where the Board consistently asserts its jurisdiction, but where a state agency would be available to assume a part of the burden. Such was the situation prior to the *Bethlehem Steel* case, where various states through cession agreements exercised regulatory power over labor relations, which in other jurisdictions were handled by the National Board. A state operating under the cession agreement must now have laws which are not inconsistent with the federal legislation, in order to preserve desired uniformity. However, where the National Board has declined jurisdiction, there would seem to be no need of uniformity inasmuch as the absence of regulation would produce a more flagrant conflict of results than would be present under diverse state administration.

It is argued that Section 10(a) was designed as a "club to induce state legislatures to correlate their acts with national policy * * *." (Appellant's brief p. 32.) But is it conceivable that the National Congress intended that individual rights in the field of labor relations should be contingent upon state adherence to national legislation?

The Federal Congress owes a duty to all national citizens and it is very questionable that the legislative branch would intentionally prejudice the rights of persons resident in Alabama because that state's labor laws do not in all respects conform with national standards, but provide the machinery

for protecting the rights of persons resident in Vermont, where hypothetically such conformity might exist. Those who might be denied the remedy or suffer the abuse may well be powerless to effect the conformity required.

It would seem that a presumption exists in favor of state authority to act in labor disputes of this kind, and in interpreting the federal legislation involved here, the court should resolve any doubts in favor of local jurisdiction.

As was stated in the concurring opinion in *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767:

> "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. *Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.*" (Emphasis added.)

See *Palmer* v. *Massachusetts*, 308 U. S. 79.

It is our firm conviction that the purpose of the proviso of Section 10(a) was to permit cession agreements in areas where the National Board consistently exercises its regulation; that nothing in the legislation or its history indicates an intent to supersede state regulation; that any construction in this instance should be made in favor of state jurisdiction.

B. Congress did not intend to displace state jurisdiction, in view of the grave public injury that would otherwise result.

In analyzing the federal legislation in question, great weight should be given to the result of statutory construction as bearing on the intent of Congress in effecting the enactment. The position urged by the appellant would impute to Congress the desire to create a no-man's land in the field of labor relations or the exaction of a price from the states, that being legislative conformity. Such a conclusion is absurd. The National Congress historically has been vitally concerned with law and order in the field of labor relations. Even in the midst of party controversy and diverse political theory, the question has always been the nature of the law applicable and not the absence of law.

In *Bird* v. *U. S.*, 187 U. S. 118, 124, this court set forth a rule of statutory construction pertinent here.

> "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience."

See also *U. S.* v. *Powers*, 307 U. S. 214; *Knowlton* v. *Moore*, 178 U. S. 41.

To indulge in the approach advocated by the appellant would be to turn that presumption on its head and perpetuate a condition contrary to public interest.

It would seem paradoxical to hold that because the National Labor Relations Board once held an election in the case before us, the Union is beyond the control of the Utah State Labor Relations Board, because following that election

the National Labor Relations Board declined to assert jurisdiction on the grounds that the employer's business was predominantly local in character and would not add up to the standards necessary to meet the National Board's test for invoking jurisdiction.

By its ruling on July 21, 1954, in declining the instant case, the National Labor Relations Board in effect held that the employer's business impact on interstate commerce is so trivial as to warrant leaving disputes like it to local or state control.

To accept the argument of appellant is to concede that under the circumstances that were clearly demonstrated in this case, a no-man's land must exist at a state level because the National Board refuses to act. Cooperative labor relations and industrial peace cannot exist in a vacuum and should not be governed by the rules adopted by the parties to a controversy. See *Northwestern Bell Telephone Company* v. *Nebraska Railroad Company*, 297 U. S. 471. A decision precluding a state from exercising jurisdiction in the tidelands area might result in labor management activities in the future unregulated by federal law but prohibited by state law that would bar state enforcement and permit a climate of industrial relations that runs contrary to all public policy.

A labor union has much to gain by state jurisdiction being upheld in this instance. The particular facts of the case before the court would indicate that several workers were discharged because of activities for and on behalf of the United Steelworkers of America and that the appellant refused to bargain with the union, thus depriving both individuals and the group of rights guaranteed under both

federal and state laws. In the absence of the National Board's regulation of the unfair labor practices involved in this instance, no remedy would exist but for the exercise of state jurisdiction. This fact was well understood by the individuals who were discharged for activities on behalf of the union and by the union itself which pressed upon the Utah Labor Relations Board the argument that no relief was available unless it was through the state board. In support of state jurisdiction, the United Steelworkers of America argued before the Supreme Court of the State of Utah:

> "It is inconceivable that the National Congress intended that a vacuum should result from an application of federal labor legislation." (Union Brief, filed with the Supreme Court of Utah, p. 27.)

The situation remains unchanged. Members of labor unions have everything to gain from an application of law and order in this instance. If the National Labor Relations Board declines jurisdiction of a labor controversy where interstate commerce is involved, and the state board is precluded from exercising regulatory power, the particular union members are left without any remedy for unfair labor practices inflicted upon them.

Surprisingly enough, the United Steelworkers of America now file with this court a brief *amicus curiae* in which the union claims it to be the intent of Congress to create a void in the labor relations field, and the injuries suffered by the parties to this action are classed as non-catastrophic. What prompts the national counsel of the Steelworkers to argue for a reversal of the union's former position is left to conjecture, but strikingly enough its position, if now accepted by the court, would perpetuate a vacuum in the labor

relations field which could only be governed by "the rules of the jungle" so strongly argued against by this same union in the court below.

The position advocated by the union at this point of the litigation if adopted is of questionable consolation to Messrs. Illsley, Watrous, Sismondi, Lymon and the others who would lack a remedy for infringement of their right to bargain collectively (see statement of the case). The schizophrenic approach of the United Steelworkers is undoubtedly influenced by political consideration, for its brief includes excursions into areas of political debate and a commentary on the present membership of the National Board. We question the good faith of a labor organization which urges upon a state board and court a position it now argues against.

But whatever the motive of the national leadership of the labor union in question, the fact remains that individual union members are being denied rights which can only be protected in remedies granted if states are permitted to exercise jurisdiction under the facts at hand. It is absurd to interpret federal legislation as preventing this preservation and protective power.

As with the union, so with management. There is equal need for law and order to give adequate protection to management against the unfair labor practices that might result from union activity. Inasmuch as the companion cases reflect instances in which management is seeking a remedy through state courts, we deem it sufficient to state only that those cases speak for themselves as evidencing a need for the dual protection in labor relations where the National Labor Relations Board refuses to exercise its jurisdiction.

Granted that either management or labor might from time to time gain by the creation of a vacuum in the labor field, neither side could long escape direct injury. The sword would cut both ways. But whether management or labor could better its position in a no-man's situation is, of course, of secondary importance. Ultimate harm to the community must of necessity be the primary concern. Public welfare, health and safety have everything to gain by an application of law and order in this instance. This situation is more than an academic question or an opportunity to point up the relative attributes or failings of political administrations or the membership of the National Labor Relations Board.

Appellant, for purposes of argument, concedes that a state court might be permitted to act in this situation, but finds Section 10(a) as barring state board action. The distinction attempted seems without foundation, for if the state has jurisdiction in this case, it may certainly entrust such power to an administrative board. Such entrusting should not be the concern of this court. *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; 100 L. Ed. Adv. 666.

The state interest in law and order would preclude an interpretation imputing Congressional intent to displace state jurisdiction in this matter. *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; 100 L. Ed. Adv. 666. The creation and perpetuation of a labor relations no-man's land could produce nothing less than retrogression in the field of labor relations with resultant harm reflected in the lives and progress of a community.

POINT IV.

THE NATIONAL LABOR RELATIONS BOARD DECLINED TO EXERCISE JURISDICTION IN THIS CASE; HOWEVER STATE JURISDICTION WOULD ATTACH ABSENT A FORMAL DECLINATION IF THE NATIONAL BOARD'S STANDARDS MAKE IT APPARENT THAT THE NATIONAL BOARD WOULD DECLINE JURISDICTION.

In this case the United Steelworkers of America filed charges of violations under Section 8 of the National Labor Relations Act with the National Labor Relations Board, alleging that the employer, Guss, had engaged in unfair labor practices, and praying for appropriate relief. On July 21, 1954, the National Board, through its Regional Director, declined to consider the matter, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction" (R. 4).

No appeal was taken from the action of the Regional Director.

Appellant for the first time now raises the question of whether declination by the Regional Director amounts to a refusal by the National Board to exercise its jurisdiction. At prior stages of the proceeding all parties to the action had considered the Regional Director's action final, or at least that further appeal would have been a useless gesture in view of the standards promulgated by the National Board and the

nature of the appellant's business. In *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, this court held that application to the National Labor Relations Board for appropriate relief was unnecessary to raise the issue at hand if it would be futile to make such application.

As far as this case is concerned, we submit that action by the Regional Director of the National Labor Relations Board may be equated to action by the Board itself, or if not, at least that an appeal to the National Board would have been a futile gesture.

Furthermore, we are of the conviction that state jurisdiction would attach absent a formal declination by the National Board if yardsticks promulgated by the Federal agency make it apparent that jurisdiction would be declined. The purpose behind the promulgation of standards by the National Labor Relations Board was to give notice in advance of those areas over which the agency would exercise jurisdiction. Requiring a claimant to go through the useless, expensive and delaying procedure of formal application to the National Board, would result in unsettled labor matters and the development of a prohibitive case load, with an attending expense which the National Board has attempted to reduce through its yardstick promulgation. And what conceivable effect could be given to the clause relieving such application "if it would be futile to do so"? *Kinard* case, supra. The purpose behind the very adoption of the standards of the Board would be frustrated if the Board itself were called upon to decide every jurisdictional question.

The brief *amicus curiae* filed by the United Steelworkers of America concedes that a declination by the National

Board has taken place in this case. Nevertheless, the Union and appellant are disturbed by the confusion that might result from this court's holding that state jurisdiction would attach to any labor dispute which appears to fall outside the area included in the National Labor Relations Board's standards, even though no application has been made to the National Labor Relations Board for relief. The Steelworkers point up various areas where allegedly diverse interpretations of the Board's standards could result in confusion. But the possible difference in interpretation is not peculiar to this situation. It is the same with any administrative regulation or statute. Doubt could only be finally erased by judicial determination. However, the possibility of differing interpretation is certainly not a basis for refusing state jurisdiction in such an instance.

Furthermore, whatever drawback might be pointed up regarding the possible amendment of the National Board's standards could also be said of any regulation or statute. All would be susceptible to change. The possibility that regulations, standards or statutes might be amended periodically has never been a basis for ruling out state jurisdiction in other areas where federal-local regulation has been at issue.

Some of the fears of the Union and appellant on this matter can probably be traced to the very nature of our government, for inherent in our federal system is the difficulty of drawing a hard and fast line between state and federal regulation under the Commerce Clause. *Weber* v. *Anheuser-Busch*, 348 U. S. 468, recognized the difficulty and held that the areas pre-empted by federal authority "are not susceptible of delimitation by fixed metes and bounds * * *."

Concede for argument that some confusion may exist under the N. L. R. B.'s jurisdictional standards in view of the peculiar relationship of the federal and state governments. Nevertheless this potential has never previously been a sufficient basis to rule out state regulation.

The problem that the Steelworkers and appellant raise in this instance is not answered by barring state jurisdiction in the interest of avoiding possible problems of interpretation and change in the future, for we still must live with the problem of greater magnitude, that of effecting a solution to labor disputes that are not regulated by federal authority, and can only be solved by state jurisdiction.

CONCLUSION

No matter how you slice it, the case boils down to this: Unfair labor practices will go unregulated entirely or they will be regulated by a state labor board in this instance.

In view of the authorities cited and reasoning set forth, we submit that a state may exercise jurisdiction over a labor controversy which involves interstate commerce if the National Board has declined to regulate the matter, as is the case at hand, or where an operation does not fall within the standards promulgated by the Board, therefore indicating it would be futile to apply to the National Board for relief. The judgment of the Supreme Court of the State of Utah should therefore be affirmed.

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IN THE

Supreme Court of the United States

October Term—1956

No. 280

P. S. GUSS, doing business as PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,
Appellant

v.

UTAH LABOR RELATIONS BOARD
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE NEW YORK STATE LABOR RELATIONS BOARD AS *AMICUS CURIAE*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE NEW YORK STATE LABOR RELATIONS BOARD AS *AMICUS CURIAE*

This brief is submitted on behalf of the New York State Labor Relations Board, as *amicus curiae*, pursuant to Rule 42(4) of the Rules of this Court.

The New York Board, a quasi-judicial agency of the State of New York, administers and enforces the New York State Labor Relations Act.[1] The New York State Labor Relations Act is an exercise of the State's police power for

[1] New York State Labor Law, 30 McKinney's Consolidated Laws of New York, §§700-716.

the benefit and protection of the health, safety and welfare of its citizens,[2] and is substantially identical to the National Labor Relations Act of 1935.[3]

The broad statutory and policy objectives of the New York State Labor Relations Act are set forth in Section 700 thereof (Findings and Policy) in comprehensive and meaningful terms. It perhaps is unnecessary at this point to detail the statewide responsibilities of this administrative agency, or to include the formidable problems which impel its deep interest in this case.

The New York State Board presently is processing 1800 cases a year. An important part of these labor disputes arises out of matters over which the National Board, by its jurisdictional standards, lawfully has relinquished jurisdiction. In sum, the New York Board feels that by processing these cases it thus is continuing and extending its contribution, which commenced in 1937, to collective bargaining, industrial peace and industrial growth in the state.

The Board's view in this regard was succinctly set forth in *Matter of Raisch Motors*, 18 N. Y. S. L. R. B. 94, 96-97:

> "Where the National Board refuses to assert jurisdiction, labor disputes must be subject to regulation by the states, or they will not be regulated at all. Labor disputes may or may not substantially affect interstate commerce, but they invariably have an immediate and direct impact upon the local community in which they occur. We do not believe that Congress

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[2] New York Labor Law, §700.

[3] *Davega City Radio Stores, Inc.* v. *N.Y.S.L.R.B.*, 281 N. Y. 13, 22; *N.Y.S.L.R.B.* v. *Holland Laundry, Inc.*, 294 N. Y. 480, 492-3; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 222-223.

which granted the National Board discretionary power to decline jurisdiction ever intended to prevent the states, when that occurs, from taking necessary steps to protect their own safety, health and welfare."

Statement

The jurisdiction conferred upon the National Labor Relations Board by the National Labor Relations Act[4] extends to all labor disputes which affect interstate commerce.[5] However, the exercise of this full jurisdiction by the National Board is not mandatory. Throughout its existence, the National Board has refused "to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress," and has limited "that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce."[6] The National Board's power to withhold jurisdiction has been upheld by the federal courts.[7]

For many years the National Board's declinations of jurisdiction were on a case by case basis. In October, 1950, however, the National Board established and announced detailed jurisdictional standards specifying the types of

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[4] 61 Stat. 136 (1947), 29 U.S. C. (Supp. III) §141 et seq., hereinafter called the Taft-Hartley Act.

[5] Taft-Hartley Act, §2(6), (7). *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *N.L.R.B.* v. *Fainblatt*, 306 U. S. 601.

[6] *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 636.

[7] *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U. S. 675, 684; *Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 187 F. 2d 418; review den. 342 U. S. 815; *Progressive Mine Workers* v. *N.L.R.B.*, 189 F. 2d 1, cert. den. 342 U. S. 868; *N.L.R.B.* v. *Daboll*, 216 F. 2d 143, cert. den. 348 U. S. 917.

enterprises over which it would assert jurisdiction thereafter.[8] In July, 1954, it established and published amended and more restrictive standards, which are still in effect.[9]

Questions Presented

The basic question presented is whether the states may regulate labor disputes which affect interstate commerce, but over which the National Board refuses to assert jurisdiction on the ground that the matters involved are predominantly local in nature.

If the foregoing question is answered in the affirmative, a subsidiary question is presented, namely, may the states act where it appears that the employer's operations fail to meet the National Board's jurisdictional standards, or is state regulation permissible only after the National Board formally has rejected jurisdiction over the specific labor dispute?

Summary of Argument

POINT I

The field of labor relations traditionally has been a matter of local concern and within the power of the states legally and practically to regulate.

Under long-established principles, a Congressional intent to supersede state law should never be found unless clearly manifested. The Taft-Hartley Act contains no express declaration of a congressional intent to preclude state regulation. Congress left much to the states, and it

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[8] *N.L.R.B. 15th Annual Report* (1950), pp. 5-7.
[9] *N.L.R.B. 19th Annual Report* (1954), pp. 3-5.

is necessary to spell out from conflicting indications of congressional will the areas in which state regulation is permissible.

This Court, in a series of decisions, has found an implied intent to preclude state regulation of labor disputes over which the National Board *will assert* jurisdiction. The rationale of those decisions is based upon the conflict, actual or potential, inherent where the federal and state governments exercise *concurrent* jurisdiction over the same employment relationship. That rationale is inapplicable here, for the frictions, uncertainties and potential conflicts arising from the application of dual controls are non-existent where the National Board refuses to exercise jurisdiction.

POINT II

A

State regulation of labor disputes affecting interstate commerce is permissible where the National Board has refused jurisdiction.

Where federal law "leaves the employer-employee relationship free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do, we can only assume it to be equally indifferent to what he may do under the compulsion of the state." (*Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. 767 at 773.)

Similarly, state regulation of local matters affecting interstate commerce is not precluded where the powers delegated to a federal administrative agency lie dormant and

unexercised. The mere grant by Congress, to a federal agency, of powers in respect to interstate commerce does not of itself, and in the absence of action by the agency, interfere with the authority of the state to make those regulations which are conducive to the welfare and convenience of its citizens. In the absence of specific action by the federal agency, the control of the state over local matters remains undisturbed. State regulation is permissible even where federal administrative regulation has been authorized, adopted and is only awaiting its effective date. The permissibility of state regulation is even more evident here, where the declination of jurisdiction by the National Board leaves all aspects of the employment relationship unregulated and constitutes an express disclaimer of both federal interest and contemplated federal action.

In declining jurisdiction, the National Board "is defining the limits of [its] jurisdiction pursuant to the discretionary power vested in [it] by the Congress." (*Breeding Transfer Co.*, 110 N.L.R.B, 493, 497). If Congress had excluded local labor disputes from the coverage of the Taft-Hartley Act, the states would be free to act in the area beyond the line drawn by Congress. Where Congress has delegated that line-drawing power, the same result must follow. To hold otherwise would be to give the exercise of the delegated power greater effect than if Congress, itself, had exercised the power in the first instance.

B

Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction. In such cases, state power is restored by operation of law, not by agreement.

Section 10(a) was not enacted as a limitation on the power of the National Board to enter into cession agreements with state agencies, but to eliminate any doubt as to the power of the Board to enter into such agreements. Not one of the decisions of this Court, barring state regulation, was based upon §10(a). To the contrary, this Court has indicated that the provisions of §10 appear to contemplate a remedy to supplement, rather than to substitute for, existing ones.

The National Board's power to refuse jurisdiction over predominantly local matters in all states and territories should not be confused with its power to cede jurisdiction over cases which it ordinarily would process, but which it may prefer to transfer to available state agencies administering consistent statutes. Where the National Board *would* assert jurisdiction, a cession agreement is a condition precedent to state regulation, for it is necessary to avoid potential conflict and to insure uniformity of law in matters as to which federal policy is not indifferent. Where the National Board *refuses* jurisdiction, because of the local nature of the matters involved, there is no dual jurisdiction, no possibility of shopping for a forum, and no potentials of conflict. Only state authority remains to effectuate the public interest in the maintenance of industrial peace, and the state then provides the only forum available to the parties.

C

It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be wholly unregulated. Congress, in 1947, was well aware of the National Board's policy of refusing to assert its jurisdiction "to

the hilt." Indeed, Congressional Committees had criticized the Board for its failure to restrict even further the area in which it asserted jurisdiction.

Approximately 90.6 per cent of all business enterprises employ less than 20 persons. It is in this area of "small business" that the National Board generally declines jurisdiction. While labor disputes in this area may not have a sufficiently substantial effect upon interstate commerce to warrant the intervention of federal power, they have an immediate, direct and substantial effect upon the health, safety, welfare and convenience of the local communities in which they occur. To hold that the states may not act, where the National Board declines to do so, would relegate the parties to the use of industrial and economic warfare, a result obviously contrary to the public policies and best interests of the nation and the states. The declination of jurisdiction by the National Board cannot be read as authorizing the parties to labor disputes to fix their own rules of industrial warfare in defiance of state power. The doubtful constitutionality of the Taft-Hartley Act, if so construed, precludes acceptance of such a construction.

POINT III

A formal declination of jurisdiction over the specific labor dispute is not necessary where it is clear that the employer's operations do not meet the National Board's jurisdictional standards.

The purpose of the standards published by the National Board was to notify the public, *in advance,* of the types of enterprises over which jurisdiction would be asserted, and thus permit the Board to devote its time, energies and budgetary allotment to matters which substantially affect

interstate commerce and are of real federal significance. A requirement that the National Board must formally decline jurisdiction over each particular labor dispute would defeat the purposes of the standards. It would encumber the Board with unnecessary work and expense, add to its backlog of cases, and seriously delay the processing of local labor disputes by the states.

A penumbral area is inevitable under a federal system, but the existence of some doubtful, border-line cases cannot upset an otherwise lawful and practical allocation of jurisdiction between the federal and state governments. It must be assumed that state authorities will recognize and honor the line of demarcation between exclusive federal and allowable state jurisdiction. If doubt exists, state jurisdiction will be declined and the parties referred to the National Board. Where state jurisdiction is asserted, the decision will be subject to review by this Court.

ARGUMENT.

POINT I

Congressional intent to supersede state law should never be held unless clearly manifested.

A. The Taft-Hartley Act contains no express declaration of a congressional intent to preclude state regulation.

B. Decisions of this Court precluding state regulation of labor disputes over which the National Labor Relations Board will assert jurisdiction are based upon potentials of conflict not present where the National Board has declined jurisdiction.

The field of labor relations traditionally has been a subject of local concern, regulated by the states. Recent federal regulation thereof is not based upon a direct interest in that field, but, indirectly, through the federal power to regulate interstate commerce (Taft-Hartley Act, Section 1, 29 U.S.C.A. §151; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). As this Court said in *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. 767, 772:

> "* * * labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so 'intimately blended and intertwined with responsibilities of the national government' that its nature alone raises an inference of exclusion."

A. The Taft-Hartley Act contains no express declaration of any intent to preclude state action where federal jurisdiction is declined.

Even where interstate commerce is directly involved, it has long been established that

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of a State, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested." (*Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85.)[10]

The Taft-Hartley Act contains no express declaration of a congressional intent to supersede state power. In *U.A.W.* v. *Wisconsin Board*, 336 U. S. 245, 252, this Court pointed out that

> "Congress has not seen fit in either of these Acts [Wagner and Taft-Hartley Acts] to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control."

To same effect, see *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. 767 at 771.

[10] See, to same effect, *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510; *Allen Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749; *U.A.W.* v. *Wisconsin Board*, 336 U. S. 245, 253; *California* v. *Zook*, 336 U. S. 725, 733; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450, 467; *Kelly* v. *Washington*, 302 U. S. 1, 10-14; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156; *Mauer* v. *Hamilton*, 309 U. S. 598, 614.

More recently, in *Garner* v. *Teamsters*, 346 U. S. 485, 488, this Court said:

> "The National Labor-Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."[11]

B. Decisions of this Court precluding state regulation of labor disputes over which the National Labor Relations Board will assert jurisdiction are based upon potentials of conflict not present where the National Board has declined jurisdiction.

Although the Taft-Hartley Act contains no express declaration of a congressional intent to bar state regulation, this Court, in a series of decisions, has found an implied congressional intent to preclude state regulation of various categories of labor disputes (*Bethlehem Steel Co.* v. *New York Bd.*, 330 U. S. 767; *La Crosse Tel. Co.* v. *Wisconsin Bd.*, 336 U. S. 18; *Plankinton Packing Co.* v. *Wisconsin Bd.*, 338 U. S. 953; *U.A.W.* v. *O'Brien*, 339 U. S.

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[11] Subsequently quoted in *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 664, and in *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480. The areas in which state action is permissible include (1) prohibition of violence, mass picketing and disorderly conduct (*U.A.W.* v. *Wisconsin Board*,——U. S.——, 100 L. ed. (Advance, p. 666); (2) regulation of union security clauses (Taft-Hartley Act, §14 (b); *Algoma Plywood Co.* v. *Wisconsin* Board, 336 U. S. 301); (3) activities neither prohibited nor protected by the Taft-Hartley Act (*U.A.W.* v. *Wisconsin Board*, 336 U. S. 245); (4) actions for damages caused by unlawful secondary boycotts and jurisdictional disputes (Taft-Hartley Act, §303); (5) actions for damages caused by tortious, primary picketing (*United Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656; (6) actions for breach of a collective agreement (H.R. Rep. No. 510, 80th Congr., 1st Sess., pp. 41-42; *Assn. of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437).

454; *Amalgamated Street Car Employees* v. *Wisconsin Bd.*, 340 U. S. 383; *Garner* v. *Teamsters*, 346 U. S. 485; *Bldg. Trades Council* v. *Kinard Constr. Co.*, 346 U. S. 933; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468).

In each of the cited cases, however, the state had claimed and asserted *concurrent* jurisdiction over a labor dispute as to which the National Board concededly had, and *would assert*, jurisdiction. The importance of that distinguishing factor has been recognized by this Court, which has been careful to emphasize that "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem which we do not now decide." (*Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. at 776. See, to same effect, *Garner* v. *Teamsters*, 346 U. S. 485, 488, and *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.)

The rationale underlying this Court's decisions barring *concurrent* state jurisdiction clearly is inapplicable where the National Board has refused jurisdiction. The vice of dual jurisdiction, this Court said, is in the "potentials of conflict" between decisions and policies of the National Board and the state boards (*La Crosse* case, 336 U. S. at 26). Thus, "If the two boards [federal and state] attempt to exercise a concurrent jurisdiction, * * * action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict" (*Bethlehem* case, 330 U. S. at 776). And in *Garner* v. *Teamsters*, the Court said that these same reasons require the exclusion of action by state courts in like matters. (346 U. S. at 491. See also, *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474-476.)

Manifestly, that rationale is not germane in situations where the National Board refuses jurisdiction, for the vexatious problems of concurrent jurisdiction are then eliminated. When the National Board has declined to act there can be no dual assertion of jurisdiction, no potentials of conflict, and no possibility of "shopping for a forum." The state then is the only authority left to effectuate the public interest in the maintenance of industrial peace, and the state forum provides the only remedy available to the parties.[12]

The rationale adopted by the Supreme Court was urged in the brief filed by the United States as *amicus curiae* in the *Bethlehem* case. That brief, however, recognized that the rationale was not applicable to cases in which the National Board refused to assert jurisdiction. Thus, it was there stated (brief of United States as *amicus curiae*, p. 69):

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[12] A change in policy, and expansion of its jurisdiction, by the National Board would not result in conflict. In representation proceedings, the National Board, in the past, has given effect to elections conducted by local agencies and officials (*Olin Mathieson Chem. Corp.*, 115 N.L.R.B. No. 245; 38 LRRM 1099; *Mervin Wave Clip Co.*, 114 N.L.R.B. 157; *T-H Products Co.*, 113 N.L.R.B. 1246; *Oil Transport, Inc.*, 106 N.L.R.B. 1321; King Brooks, Inc., 84 N.L.R.B. 652, 653; *National Container Corp.*, 87 N.L.R.B. 1065, 1066-7; *Weaver Wintark*, 87 N.L.R.B. 351, 362. See also, *Stewart Warner Co.* v. *N.L.R.B.*, 194 F. 2d 207, 210). New proceedings, of course, would be filed with the National Board. In unfair labor practice proceedings, the National Board has refused to give retroactive effect to a change in policy extending its jurisdiction. It has declined to proceed where the alleged unfair labor practices occurred at a time when the employer's operations did not meet its then effective jurisdictional standards (*Yellow Cab Co.*, 93 N.L.R.B. 766; *Screw Machine Products Co.*, 94 N.L.R.B. 1609; *Almeida Bus Lines*, 99 N.L.R.B. 498; *Compressed Air, etc. Union*, 93 N.L.R.B. 1646; *N.L.R.B.* v. *Guy F. Atkinson Co.*, 195 F. 2d 141). Moreover, §10(b) of the Taft-Hartley Act would bar the National Board from processing unfair labor practices more than six months old.

> "* * * The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are non-existent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction."

In May, 1954, George J. Bott, then General Counsel to the National Board, re-affirmed that statement, saying (34 L. R. R. M. 78, 80):

> "The problem which emerges is this: if the activity affects interstate commerce but the Board declines to assert its jurisdiction, is there a no-man's land created where the states cannot act and the Board will not act? In practice the Board never has, and I think I may confidently predict it never will, interfere to block state action in a situation where the Board chooses to stay its hand because it believes the impact of the activity on commerce to be insubstantial. Yet the question may nevertheless arise should a private party choose to challenge the power of the state to act in such a situation * * *. To me it seems clear that as a matter of policy there is no reason why a state should not be free to act in this situation. Once it is recognized that Congress has authorized the Board in its discretion to withhold the full exercise of its jurisdiction, I cannot see any considerations of policy which make it necessary or desirable to exclude the states from any field that the Board properly abnegates in this way."[13]

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[13] The memorandum submitted by the National Board to this Court in *United Construction Workers* v. *Laburnum Constr. Corp.* (347 U. S. 656), states (p. 11) that the National Board, "as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction."

See also, the National Board's brief *amicus curiae* in *Bethlehem Steel Company* v. *N.Y.S.L.R.B.* (330 U. S. 767) pp. 69-70, quoted *infra*, p. 35, n. 36.

See, to the same effect, Cox and Seidman, *Federalism and Labor Relations*, 64 Harvard Law Review, No. 2 (1950) 211 at 216; Geyls: *The National Labor Relations Board Jurisdictional Standards: A Problem in Federalism*, XVI Revista Del Colegio De Abogados de Puerto Rico (1955) 31.

It is clear, therefore, that the Taft-Hartley Act contains no express declaration of a congressional intent to supersede state regulation of labor disputes, and that decisions precluding state regulation where the National Board has, and will assert, jurisdiction are not apposite here.

POINT II

State regulation of labor disputes affecting interstate commerce is permissible where the National Board has declined jurisdiction.

A. State regulation of local matters is not precluded where the powers delegated by Congress to a federal agency have not been exercised.

B. Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction.

C. It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be left wholly unregulated.

Although this Court has not ruled on the power of the states to regulate labor disputes over which the National Board has refused jurisdiction, pertinent decisions of this Court, and the principles of constitutional law enunciated therein, clearly indicate the propriety of state regulation under such circumstances.

A. State regulation of local matters is not precluded where the powers delegated by Congress to a federal agency have not been exercised.

Basic, of course, is the primary principle that supersedure should never be held, even where that may be done, unless and except so far as a congressional purpose to do so is clearly manifested (*Welch Co.* v. *New Hampshire*, 306 U. S. 79). This fundamental principle, safeguarding the preservation of the states' reserve powers, has been held particularly pertinent, if not controlling, where, as here, the subject matter is one "primarily of interest to the state, * * * within its competence legally and practically to regulate * * *"[14] and where the delegated federal power lies "dormant and unexercised"[15] (*Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623).

In the *Bethlehem* case, *supra*, this Court, discussing the doctrine of supersedure, said (330 U. S. at 773):

> "Where it [the National Act] leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state."

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[14] *Bethlehem Steel Co.* v. *New York Board*, 330 U. S. at 772.

[15] In the *Bethlehem* case, the Court stated that the situation there presented could not be treated as one in which federal power was "dormant and unexercised," since the National Board had not declined jurisdiction and its refusal to certify units of foremen "was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes." (330 U. S. at 774-5)

Under the National Act, Congress has granted the National Board discretionary power to refuse jurisdiction where the impact on interstate commerce is not sufficiently substantial to warrant the exercise of federal power. Certainly declination of jurisdiction on that ground demonstrates federal "indifference" to the labor disputes involved, and, by the same token, to state regulation thereof.

Continuing, the *Bethlehem* opinion further states (330 U. S. at 774):

> "• • • even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co.* v. *Nebraska State Commission, supra; Welch Co.* v. *New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1."

The foregoing quotation, and the cases cited therein, are particularly apposite here. The National Board's refusal to assert jurisdiction over the labor relations of particular industries or enterprises creates "separable and distinct segments" more clearly defined than the "segments" found in the cases cited in the *Bethlehem* opinion. In those cases, federal regulation was extensive, covering all major aspects of the subject matter. Nevertheless, state law was held applicable to a narrow phase of the same subject, not covered by federal administrative regula-

tion, *although federal regulation thereof was authorized, adopted and awaiting only its effective date.* Where the National Board has declined jurisdiction, the propriety of state regulation is even more evident, for the National Board's declination of jurisdiction leaves *all* aspects of the labor dispute unregulated by federal law, and affirmatively disclaims both federal interest and contemplated action.

In *Northwestern Bell Telephone Company* v. *Nebraska Ry. Comm.*, 297 U. S. 471, the Interstate Commerce Commission, pursuant to the Interstate Commerce Act, had prescribed a uniform system of accounts for telephone companies, but had not fixed depreciation rates. By amendment of that act, Congress directed the Commission, "as soon as practicable," to fix depreciation rates which, when established, were to be mandatory and exclusive. The congressional directive for prompt action, and the express provision that the federal regulation should be exclusive, stand in sharp contrast to the discretionary jurisdiction of the National Board and the absence of any express language of pre-emption in the Taft-Hartley Act. Despite the congressional directive and mandate, this Court upheld the right of the state to fix depreciation rates prior to effective action by the Interstate Commerce Commission. The Court there said (297 U. S. at 480):

> "In any event, we think that §20(5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates except by prescribing a rate administratively determined by the Commission itself. A direction that the Commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to

permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction."

Where the National Board has been given power to decline jurisdiction, it may be said, with even greater justification, that it is hardly conceivable Congress could have intended that the exercise of this power should leave the labor disputes entirely unregulated and the parties thereto free to fix their own rules of industrial warfare. The practicalities of the situation, and the doubtful constitutionality of a federal law prohibiting the exercise of state police power over local matters, not federally regulated, manifestly "precludes * * * acceptance of such a construction."

In *Welch Company* v. *New Hampshire,* 306 U. S. 79, state regulations prohibited drivers of common and contract carriers from operating motor vehicles for more than twelve consecutive hours. Regulations adopted by the Interstate Commerce Commission, but not yet effective, prohibited a driver from remaining on duty for more than ten consecutive hours.

This Court, upholding the application of state law, pointed out that the federal commission was merely "authorized" to regulate that subject, and emphasized the distinction between "duty imposed and action permitted" (306 U. S. at 84). So, too, in the case at bar, there is the same distinction between a "duty imposed" upon the National Board and "action permitted" to it, for Congress granted the National Board discretionary power "to withhold jurisdiction" (*Haleston Drug Stores, Inc.* v. *N.L.R.B.,* 187 F. 2d 418, 422, review den. 342 U. S. 815; *N.L.R.B.* v.

Denver Bldg. Trades Council, 341 U. S. 675, 684). That distinction is even more significant here, for the National Board's declination of jurisdiction constitutes a clear disclaimer of both interest and contemplated action, whereas in the *Welch* case, state regulation was upheld even though federal administrative regulation was actually adopted and awaiting only its effective date.

In *California* v. *Thompson*, 313 U. S. 109, the question presented was the constitutionality of a California statute which required the licensing of anyone who "sells or offers to sell" transportation over the public highways of the state. Thompson had been convicted of violation thereof for arranging the transportation of passengers from California to Texas. The Federal Motor Carrier Act excluded from its coverage "casual, occasional or reciprocal transportation" of the type involved (49 U.S.C.A., Sec. 303 b). Although not mentioned in the opinion, the federal act gave the Interstate Commerce Commission power, in its discretion, to remove that exemption (see *California* v. *Zook*, 336 U. S. 725, 727, 742-743, 756). In the absence of an exercise of that power by the Interstate Commerce Commission, the Supreme Court treated the question as one involving "The constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power" (313 U. S. at 112), and upheld the conviction.[16]

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[16] See also, *Terminal R. R. Assn.* v. *Bro. of R. Trainmen*, 318 U. S. 1; *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268, 273; *Kelly* v. *Washington*, 302 U. S. 1, 9-14; *Mintz* v. *Baldwin*, 289 U. S. 346.

Thus, where the delegated federal power lies "dormant and unexercised," this Court has held state regulation permissible, even though federal administrative regulation was authorized, adopted, and awaiting only its effective date. This long-established principle was clearly and forcibly stated in *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623:

> "On the other hand, it is said that Congress has already acted,—has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. *In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition*

> *cannot be sustained. Until specific action by Congress or the Commission, the control of the state over these incidental matters remains undisturbed.*" (Italics added.)

The logical basis of that principle, and the practical necessity therefor, are particularly apparent in its application to the question here presented. Here, there is far more than the mere negative failure of a federal agency to act. There is an express, affirmative declaration by the National Board that it will not act because the matters involved are predominantly local in nature and do not warrant the intervention of federal power.

In refusing jurisdiction, the National Board is "defining the limits of [its] jurisdiction pursuant to the discretionary power vested in [it] by the Congress." (*Breeding Transfer Co.*, 110 N.L.R.B. 493, 497.) There can be no doubt that if Congress itself had excluded local and borderline cases from the coverage of the Taft-Hartley Act, the states would be free to act in the area beyond the line drawn by Congress, for

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside the limited field and otherwise admissible is not forbidden or displaced." (*Kelly* v. *Washington*, 302 U. S. 1, 10)[17]

Where Congress, instead of exercising that line-drawing power, delegated it to the National Board, the same result must necessarily follow. To hold otherwise

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[17] See also, *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. at 776; *U.A.W.* v. *Wisconsin Bd.*, 336 U. S. 245, 254; *Allen Bradley Local* v. *Wisconsin Bd.*, 315 U. S. 740; *California* v. *Thompson*, 313 U. S. 109, 113; *Savage* v. *Jones*, 225 U. S. 501, 533.

would be to give the exercise of the delegated power greater effect than if the power had been exercised by Congress itself in the first instance.[18]

B. Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction.

Section 10(a) provides as follows:

> "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is *empowered* by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where pre-

[18] In this connection, it should be noted that the National Board's discretionary curtailment of its jurisdiction and its promulgation and publication of jurisdictional standards, in 1950 and 1954 (NLRB, 15th Annual Report, pp. 5-6; 19th Annual Report, pp. 2-5) followed congressional criticism of the National Board's assertion of jurisdiction over predominantly local matters. 12th Interm. Report, House Committee on Expenditures in the Executive Departments, H. Rept. No. 2050, 80th Cong., 2d Sess., pp. 4-5; Report of the Joint Committee on Labor-Management Relations, S. Report 986, Part 3, 80th Cong., 2d Session, pp. 13-15; Report of Senate Committee on Labor and Public Welfare, S. Report, No. 99, 81st Cong., 1st Sess., p. 43. See also, for congressional approval of the National Board's declination of jurisdiction over local matters: Hearings before the Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., p. 177; Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248, 81st Cong., 2d Sess., p. 35; Hearings before the House Committee on Expenditures in the Executive Departments on H. Res. 512 and H. Res. 516, 81st Cong., 2d Sess., p. 109; Hearings before the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess., p. 45.

dominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith." (italics added)

It has been said that a cession agreement, pursuant to §10(a), provides the only method by which states can obtain jurisdiction, and that declination of jurisdiction by the National Board, standing alone, cannot confer state jurisdiction.[19] The argument is premised upon the assertion that §10(a) "withdrew from the National Board the authority it had exercised prior to 1947 to cede jurisdiction on its own terms" and that Congress, therefore, must have intended to bar state action in the absence of affirmative cession, even where the National Board refused jurisdiction.[20] This contention is without merit, finding no support in the language of §10(a), its history and purpose, or in decisions of this Court.

Not one of this Court's decisions barring state regulation was based upon §10(a). In each case, the basis of decision was the conflict, actual or potential, resulting from the state's assertion of concurrent jurisdiction.[21]

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[19] E.g. *Retail Clerks Union* v. *Your Food Stores of Santa Fe, Inc.*, U.S.C.A.—10, 225 F. 2d 659; *N.Y.S.L.R.B.* v. *Wags Transp. Corp.*, 130 N.Y.S. (2d) 731, affd. on other grounds, 284 App. Div. (N. Y.) 883.

[20] *New York Board* v. *Wags Transp. Corp.*, 130 N.Y.S. (2d), 731, 743-744, aff'd on other grounds 284 App. Div. (N. Y.) 883.

[21] *La Crosse Tel. Co.* v. *Wisconsin Board*, 336 U. S. 18, 25-27; *U.A.W.* v. *O'Brien*, 339 U. S. 454, 458-459; *Amalgamated Street etc. Employees* v. *Wisconsin Board*, 340 U. S. 383, 394; *Garner* v. *Teamsters*, 346 U. S. 485, 490-491; *Bldg. Trades Council* v. *Kinard Constr. Corp.*, 346 U. S. 933; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480-1.

The first sentence in §10(a) "empowers," but does not require, the National Board to act (*Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 187 F. 2d 418, 421, rev. den. 342 U. S. 815). The second sentence, excluding the proviso, provides that the power of the National Board to act "shall not be affected by any other means of adjustment or prevention * * *." This phrase, too, contains no statement, express or implied, that "other means of adjustment or prevention" are precluded. Its plain meaning is exactly the converse, namely, the fact that other means of adjustment and prevention exist shall not preclude the National Board from exercising its powers, if it so desires. Thus, in *Garner* v. *Teamsters,* 346 U. S. 485, 492-3, the Court said that this language "seems to contemplate a remedy to supplement, rather than to substitute for, existing ones." Again, in *United Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 667, this Court, after referring to §10(a) pointed out that §10(c) "directs the Board to issue a cease and desist order after an appropriate finding of fact. There is no declaration that this procedure is to be exclusive." The Court further said (347 U. S. at 665), "The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case, was itself a recognition that if no conflict existed, the state procedure would have survived."

Nor does the proviso, which "empowers" the National Board to enter into cession agreements, contain any indication that such an agreement is necessary in cases where the National Board declines to act at all. To the contrary, §10(a), read as a whole, clearly indicates that since the National Board may decline to act, and thus fix the bound-

aries of its jurisdiction, the provision permitting cession agreements must refer, and is limited, to the area in which the National Board exercises jurisdiction. If the cases upholding the power of the National Board to draw a national line, beyond which jurisdiction will not be exercised, are to be given their proper meaning in the complex of federal-state relationships today, then the area of declination legally must be equated with the area left free to regulation by the states. If the states are not free to act in that area, then the power to decline could not have been constitutionally permitted (*supra*, pp. 19-20).

This interpretation of the language of §10(a) is consistent with, and supported by, its history and purpose.

The proviso contained in §10(a) was *not* enacted as a limitation of the power of the National Board to cede jurisdiction. The National Labor Relations Act of 1935 contained no express authorization of cession agreements. The National Board, however, had entered into such agreements with state boards. The agreement between the National and New York boards is set forth in the appendix to *Bethlehem Steel Company* v. *New York Board*, 330 U. S. at 784-797. Thus, for example, the New York Board handled labor disputes involving New York department stores[22] although in other states, which had no state boards, such cases were handled by the National Board.[23]

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[22] *Montgomery Ward & Co., Inc.*, 5 N.Y.S.L.R.B. 441, enforced 179 Misc. (N. Y.) 298, aff'd 266 App. Div. (N. Y.) 878; *Bonwit Teller, Inc.*, 4 N.Y.S.L.R.B. 945, enforced (not officially reported) 5 Labor Cases ¶60,899, 9 L.R.R.M. 765.

[23] *May Dept. Stores Company*, 53 N.L.R.B. 1366, enforced 146 F. 2d 66, aff'd 326 U. S. 376; *Marshall Field & Company*, 54 N.L.R.B. 1, enforced 129 F. 2d 169, aff'd 318 U. S. 253; *J. L. Brandeis & Sons*, 53 N.L.R.B. 352, enforced 142 F. 2d 977.

The opinion of this Court in *Bethlehem Steel Company* v. *New York Board*, decided in April, 1947, raised some doubt as to the National Board's power to enter into cession agreements (see separate opinion of Frankfurter, J., 330 U. S. at 777-778). The proviso in §10(a) was added in June, 1947, not to limit the National Board's power to cede jurisdiction, but to eliminate any doubt as to its authority to enter into such agreements (S. Rep. No. 105, 80th Cong., 1st Sess., Part I, p. 26, Part II, p. 38; S. Rep. 99, 81st Cong., 1st Sess., p. 43; 93 Cong. Rec. 6383-4).

Further, the argument that a cession agreement under §10(a) provides the sole method by which state jurisdiction may be "restored," fails to distinguish between (1) the power of the National Board to refuse jurisdiction over predominantly local matters in all states and territories, regardless of whether there are, or are not, available state agencies, and (2) its power, under §10(a) to cede jurisdiction over cases which the National Board ordinarily *would* process, but which it may prefer to transfer to available state agencies administering consistent statutes.

Manifestly, it is only where the National Board *would* assert jurisdiction that cession is necessary. In such cases, a cession agreement is required in order to avoid the potentials of conflict inherent in concurrent jurisdiction and to insure uniformity of law in matters as to which federal policy is not indifferent.

But where the National Board *refuses* jurisdiction, there is no dual jurisdiction and no possibility of shopping for a forum. In declining jurisdiction, the National Board

is "defining the limits of [its] jurisdiction pursuant to the discretionary power vested in [it] by the Congress."[24] Its action has the same effect as if Congress had excluded such matters from the coverage of the Act (pp. 23-24, *supra*). The refusal of jurisdiction is an affirmative declaration that federal policy is indifferent, and that national uniformity is not essential. As this Court said in the *Bethlehem* case (330 U. S. at 773), if federal policy "is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state." In such cases, therefore, state jurisdiction is permissible by operation of law, and no cession agreement is required. Where federal jurisdiction is declined, there is, *in fact*, no overlapping of federal and state law, and "where the State and federal laws do not overlap, no cession is necessary, because the State's jurisdiction is unimpaired." (*Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 313.)

C. It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be left wholly unregulated.

If Congress had intended to bar state action where the National Board declines jurisdiction, it readily could have said so in clear and unambiguous language. Congress, however, has not done so, and it would be wholly unreasonable and unrealistic to impute such an intention to Congress. Particularly is that so since Congress, in 1947, was well aware of the National Board's policy of refusing to

[24] *Breeding Transfer Co.*, 110 N.L.R.B. 493, 497.

exercise its jurisdiction "to the hilt," and had criticized the National Board for its failure to restrict its jurisdiction even further.[25]

It has been estimated that 25 per cent of the non-agricultural labor force is employed in businesses over which the National Board does not assert jurisdiction.[26] In view of the reach of the commerce power,[27] it would seem that a major portion of this figure consists of employees over whom the National Board could, but declines to, assert jurisdiction.

The extent of this potential no-man's land is also reflected in the reports of governmental investigations as to the distribution of business enterprises on the basis of the number of persons employed. According to a joint study made by the Bureau of Old-Age and Survivors Insurance and the Bureau of the Census, approximately 90.6% of all businesses in the country employ less than 20 persons.[28]

New York is the leading industrial state in the nation, employing 12.1 per cent of the national working force. A survey made by the New York State Department of

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[25] Note 18, p. 24, *supra.*

[26] Rosenthal, Exclusions of Employees under the Taft-Hartley Act, 4 Industrial & Labor Relations Review, 556, 564, 568, July, 1951; Killingsworth, State Labor Relations Acts: A Study of Public Policy (Univ. of Chicago) pp. 3-4.

[27] *Wickard* v. *Filburn,* 317 U. S. 111; *N.L.R.B.* v. *Fainblatt,* 306 U. S. 601; *Denver Bldg. Trades Council* v. *N.L.R.B.,* 341 U. S. 675.

[28] County Business Patterns, Part I, First Quarter, 1953, published by U. S. Departments of Commerce and Health, Education and Welfare, pp. 4-6, Table 1A. For statistics as to the individual states and territories, see Table 1B, pp. 8-52.

A table setting forth the distribution in each state and the District of Columbia is printed as Appendix A, hereto.

Commerce in 1951[29] showed that 446,130 firms (77% of the business establishments in the state) employed 3 persons or less; 503,560 firms (87%) employed 7 persons or less; and 547,370 firms (94%), employing less than 20 persons, accounted for 24% of the total employees in the state and 23.8% ($3,584,200,000) of the total payroll. The survey further disclosed that small business is not confined to any particular section of the state's economy, but is fairly uniform throughout all classifications. Businesses with less than 50 employees comprised 93% of all mining concerns, 98.7% of all construction firms, 97.6% of transportation firms, and 88.3% of manufacturing companies. In the distribution trades, firms employing less than 20 persons accounted for an estimated 90.5% of wholesalers, 97.9% of retailers, 96.4% of financial firms and 96.3% of all service businesses.

It is in this area of "small business" that the National Board generally declines jurisdiction.[30] While labor disputes in this area may not have a sufficiently substantial effect on interstate commerce to warrant the exercise of federal power, there can be no question that they have an immediate and direct effect upon the health, safety, welfare and convenience of the local communities in which they occur.

When the National Board refuses jurisdiction, only state authority is left for the protection of the public interest in the maintenance of industrial peace, and the state

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[29] New York Herald-Tribune, July 25, 1951.

[30] Although the National Board's jurisdictional standards are phrased in terms of dollar volume of business, there is an obvious correlation between the gross revenue of an enterprise and the number of persons employed by it (*Breeding Transfer Co.*, 110 N.L.R.B. 493, 499, n. 4).

forum provides the only remedy available to the parties to the dispute. To hold that the states may not act would relegate the parties to the use of industrial and economic warfare, a result obviously contrary to the public policies and best interests of the nation and the states. This Court, in analogous cases, has refused to impute such an intention to the Congress. Thus, it has been held that conduct which is neither prohibited nor protected by the Taft-Hartley Act is subject to state regulation, for such conduct is "governable by the State or it is entirely ungoverned." (*U.A.W.* v. *Wisconsin Board*, 336 U. S. 245, 254.) Similarly, the states may provide a remedy for damages sustained where the Taft-Hartley Act provides only for injunctive relief (*United Constr. Workers* v. *Laburnum Constr. Co.*, 347 U. S. 656, 665).

Where federal power has been withheld on the ground that the matters involved are local in nature; where federal policy thus is "indifferent"; and where Congress has not expressly and unequivocally barred state action, it would be unreasonable, unrealistic and contrary to established precedents to impute to Congress an intention to deprive the states of their power to protect the health, safety and welfare of their citizens and to deprive the parties to labor disputes of any forum or remedy.

To paraphrase the language of this Court in *Northwestern Bell Tel. Co.* v. *Nebraska*, 297 U. S. 471, 480 (quoted *supra*, pp. 19-20), the declination of jurisdiction by the National Board, pursuant to power granted it by Congress, is hardly to be read as authority to permit parties to labor disputes to fix their own rules of industrial warfare in defiance of state power. The doubtful constitutionality of the Taft-Hartley Act, if so construed, precludes acceptance of such a construction.

POINT III

A formal declination of jurisdiction by the National Board over the particular labor dispute is not necessary. The states may act when it is clear that the employer's operations do not meet the National Board's jurisdictional standards and that application to the National Board would be futile.

In the present case, the Utah Labor Relations Board did not assert jurisdiction until after a charge of unfair labor practices had been filed with the National Board and rejected on jurisdictional grounds.[31] In some cases, however, it has been held that the states may not act unless the National Board has formally rejected jurisdiction over the particular matter, even though it is clear that the employer's operations do not meet the National Board's jurisdictional standards.[32] In other cases, it has been urged that state regulation is not permissible until after exhaustion of all administrative remedies before the National Board, and, accordingly, that a National Board Regional Director's unappealed dismissal of a case, on jurisdictional grounds, is not sufficient to permit the assertion of jurisdiction by the state.[33]

It is respectfully urged that application to, and formal rejection by, the National Board is not a condition precedent to state action if it is clear that the employer's operations do not meet the National Board's standards.

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[31] *Guss* v. *Utah Labor Relations Board*, 296 P. (2d) 733.

[32] See, *e.g.*, *Benton, Inc.* v. *Printers Local 333*, 291 P. (2d) 13.

[33] See, *e.g.*, dissenting opinion in *Garmon* v. *San Diego Bldg. Trades Council*, 45 Cal. 2d 657, 291 P. (2d) 1, cert. granted, —— U. S. ——, 100 L. ed. (Advance p. 600).

The National Board's practice prior to 1950, of deciding jurisdiction in individual cases, left the status of any single enterprise uncertain until actually adjudicated. In many labor disputes and contract negotiations, management and labor were in no position to know whether they were, or were not, subject to federal law. State labor boards and courts were equally uncertain as to their authority, and their jurisdiction was subject to challenge in practically every case. The necessity of obtaining a formal disclaimer of jurisdiction burdened the National Board with useless work and unnecessary expense, and the delays involved constituted an obstacle to the maintenance of industrial peace. As a result many persons interested in the field of labor relations advocated the establishment of jurisdictional standards by the National Board.[34]

The purpose of the standards promulgated and published by the National Board was to notify the public, *in advance*, of the types of enterprises over which jurisdiction would be asserted and thus permit the Board to devote its entire time, energies and budgetary allotment to matters which substantially affect interstate commerce and are of real federal significance.[35]

A requirement that the National Board must formally decline jurisdiction of each particular labor dispute, as a condition precedent to state action, even when it is clear that the National Board's standards cannot be met, would defeat the purposes of the standards. It would encumber the National Board with unnecessary work and expense,

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[34] See, *e.g.* Cox and Seidman, *Federalism and Labor Relations*, 64 Harvard Law Review, No. 2 (December, 1950) 211, 217. See also, S. Report 986, Part 3, 80th Cong. 2d Sess., pp. 11-15.

[35] *Breeding Transfer Co.*, 110 N.L.R.B. 493-495, 497.

add to its already large backlog of cases, and seriously delay the processing of local labor disputes by the states—all to establish what was manifest from the outset. The courts never have required parties to undertake obviously futile actions. That principle is applicable here, as this Court recognized in *Bldg. Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, when it said:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, *or that it would be futile to do so,* the Court does not pass upon the question suggested by the opinion below of whether the State Court could grant its own relief should the board decline to exercise its jurisdiction." (Italics added.)[36]

It has been said that confusion would result if the states are permitted to regulate labor disputes over which the National Board refuses jurisdiction.[37] The basic premise for this argument is that the National Board's jurisdictional standards are not sufficiently definite to enable the parties or state authorities to determine in advance

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[36] In its brief *amicus curiae* in *Bethlehem Steel Company* v. *N.Y.S.L.R.B.* (330 U. S. 767) pp. 69-70, the National Board stated: "Since the states may take jurisdiction, however, only if the National Board declines to apply the National Act to the enterprise involved, a showing of such refusal to take jurisdiction by the National Board is a prerequisite to the assertion of jurisdiction by the states. This does not necessarily mean that a petition or charge must be filed with the National Board in each individual case. The National Board may announce a general policy of declining jurisdiction in an entire class of cases. * * * In such cases the National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board."

[37] See, *e.g.*, *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659, 663.

whether a particular labor dispute falls within or without the formula. This argument, it is submitted, is without merit.

The National Board's jurisdictional standards, fixed in terms of the dollar volume of income, inflow or outflow of enterprises in various industries, are specific and detailed; certainly so in comparison with the terms "affecting commerce" or "engaged in the production of goods for commerce" which are the customary guideposts provided in federal legislation.[38] In the vast majority of cases, application of the standards presents no problem. It is only in a relatively few borderline cases that any question or uncertainty arises. Such a penumbral area is inevitable under our federal system, and the existence of some doubtful borderline cases manifestly cannot upset an otherwise lawful allocation of jurisdiction between the federal and state governments. It must be assumed that state authorities will recognize and honor the "line of demarcation between exclusive federal and allowable state jurisdiction"[39] and where reasonable doubt exists, will decline jurisdiction "in deference to the tribunal which Congress has selected for determining such issues in the first in-

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[38] A 1948 report of the Joint Committee on Labor-Management Relations (80th Cong., 2d Session, S. Report No. 986, Part 3, pp. 14-15) suggested the use of dollar volumes or number of employees as appropriate methods of defining the jurisdiction of the National Board. The report further stated that "To attempt by broad general terms to exclude businesses whose operations are local in nature would again serve as no guide to the labor organizations and small employers * * *"

[39] *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 518-519.

stance."[40] If the state should assert jurisdiction, its decision will be subject to review by this Court.[41]

The argument is also erroneous in its assumption that the purported confusion it envisages would be the result of permitting state regulation where the National Board refuses jurisdiction. A boundary line between the federal and state domains is a concomitant of our federal form of government.[42] Doubtful borderline cases will arise whether the line is fixed by the Commerce Clause itself, by congressional legislation, or by a federal agency's regulations or jurisdictional standards. Such confusion as may occur results from the fact that there is a line; not from its location or the identity of its source.

The fact is, of course, that the same borderline cases will arise even if the states are not permitted to fill the vacuum created by the withdrawal of federal power over predominantly local matters. In doubtful cases, the parties still would not know whether the labor dispute comes within, or without, the National Board's standards, and hence,

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[40] *Weber* v. *Anheuser-Busch Inc.*, 348 U. S. 468, 481. It is the consistent practice of the New York Board to refer matters to the National Board when there is any doubt whether the employer's operations meet the National Board's standards (*Rothenberg* v. *N.Y.S.L.R.B.*, Sup. Ct., N. Y. Co. (not officially reported), 21 L.R.R. Man. 2142, aff'd 273 App. Div. (N. Y.) 884; *Matter of Modern Cleaners Co.*, 13 N.Y.S.L.R.B. 342; *Matter of Seymour Products, Inc.*, 12 N.Y.S.L.R.B. 46, 47-48; *Matter of Metro Hoist & Body Co., Inc.*, 14 N.Y.S.L.R.B. 308, 310-311; *Matter of Hoffman Packing Co., Inc.*, 12 N.Y.S.L.R.B. 512, 513; *Matter of Imperial Engraving Co., Inc.*, 12 N.Y.S.L.R.B. 559, 560; *Matter of Grandview Dairy, Inc.*, 11 N.Y.S.L.R.B. 112, 115; *Matter of Buffalo Industrial Bank*, 11 N.Y.S.L.R.B. 205, 206; *Matter of Buffalo General Laundries, Inc.*, 11 N.Y.S.L.R.B. 275, 276-277).

[41] *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 520-521.

[42] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; *Polish Nat'l. Alliance* v. *N.L.R.B.*, 322 U. S. 643, 649-650.

would not know whether they are subject to federal law or no law.

Moreover, preclusion of state regulation, and the resultant "no-man's land," actually would compound the purported "confusion." It would create the anomalous situation where one group is subject to federal labor law, a second group (intrastate) is subject to state labor law, and a third intermediate group is subject to no law whatsoever. The "no-man's land" manifestly would have two boundary lines, namely, (1) the "discretionary" line, created by the National Board's jurisdictional standards, which separates those matters over which the National Board will assert jurisdiction from those in which jurisdiction is declined, and (2) the "constitutional" line, which separates *intra*state matters from those over which the National Board could, but declines to, assert jurisdiction. As previously mentioned, in doubtful cases on the "discretionary" borderline, the parties would not know whether they are subject to federal law or no law. In doubtful cases on the "constitutional" borderline, the parties would not know if they are subject to state law or no law. Certainly, a single boundary line has less potential of confusion than dual boundaries on either side of a "no-man's land." Particularly is that so when the line drawn by the National Board's standards *is* detailed and specific, whereas the second boundary would require the application of abstract concepts such as "interstate" *vis a vis* "intrastate" or "a substantial direct and immediate effect upon interstate commerce" *vis a vis* "an indirect, remote and insubstantial effect upon commerce."

The question for decision, therefore, does not present a choice between confusion and certainty; the choice is between state regulation or anarchy in a substantial segment of labor relations.

Conclusion

It is respectfully submitted that state regulation of labor disputes affecting interstate commerce is permissible where the National Board has refused jurisdiction; and that application to, and formal rejection by, the National Board of jurisdiction over the specific labor dispute is not necessary where it is clear that the employer's operations do not meet the National Board's jurisdictional standards.

Respectfully submitted,

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APPENDIX A

Distribution of Business Firms in the United States According to Number of Employees.[1]

State	*Total Units Reporting*	*Per Cent[2] Employing Under 20*	*Per Cent[2] Employing 20 or More*
Alabama	37,396	90.0	10.0
Arizona	15,798	91.8	8.2
Arkansas	25,552	92.6	7.4
California	243,411	90.7	9.3
Colorado	30,335	92.0	8.0
Connecticut	44,638	90.4	9.6
Delaware	7,172	89.6	10.4
District of Columbia	17,719	89.2	10.8
Florida	70,260	91.4	8.6
Georgia	50,290	89.4	10.6
Idaho	11,813	92.9	7.1
Illinois	185,505	90.3	9.7
Indiana	73,533	90.8	9.2
Iowa	54,886	94.0	6.0
Kansas	41,386	93.2	6.8
Kentucky	39,024	91.2	8.8
Louisiana	40,218	89.5	10.5
Maine	18,769	92.7	7.3
Maryland	39,515	89.2	10.8
Massachusetts	93,907	89.1	10.9
Michigan	116,045	90.7	9.3
Minnesota	57,681	92.0	8.0
Mississippi	24,082	91.4	8.6

[1] *Source*: County Business Patterns, Part I, First Quarter, 1953, published by U. S. Departments of Commerce and Health, Education and Welfare, pp. 8-52, Tables 1B.

[2] All percentages are rounded off to the nearest tenth.

State	Total Units Reporting	Per Cent [1] Employing Under 20	Per Cent Employing 20 or More
Missouri	79,383	90.7	9.3
Montana	13,719	94.0	6.0
Nebraska	28,152	93.5	6.5
Nevada	4,787	91.8	8.2
New Hampshire	11,904	91.5	8.5
New Jersey	105,495	90.3	9.7
New Mexico	12,553	92.0	8.0
New York	370,421	90.2	9.8
North Carolina	56,520	89.3	10.7
North Dakota	10,812	94.4	5.6
Ohio	149,501	89.7	10.3
Oklahoma	40,925	92.2	7.8
Oregon	36,283	91.6	8.4
Pennsylvania	182,631	89.1	10.9
Rhode Island	16,226	88.8	11.2
South Carolina	27,857	90.8	9.2
South Dakota	12,684	95.0	5.0
Tennessee	46,810	91.6	9.4
Texas	157,147	91.1	8.9
Utah	12,505	90.9	9.1
Vermont	7,664	91.8	8.2
Virginia	52,275	90.4	9.6
Washington	49,175	91.6	8.4
West Virginia	28,606	91.5	8.5
Wisconsin	69,439	92.0	8.0
Wyoming	6,975	93.2	6.8
Total United States	2,929,184	90.7	9.3

[1] All percentages are rounded off to the nearest tenth.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, *Appellant*

v.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA

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v.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, *AMICUS CURIAE* [1]

INTRODUCTORY STATEMENT

This case, along with *Amalgamated Meatcutters, etc.* v. *Fairlawn Meats,* No. 41, and *San Diego Building Trades Council* v. *Garmon,* No. 50, presents the question of whether the states may assume jurisdiction over labor relations matters clearly subject to the terms of the National Labor Relations Act because the National Labor

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[1] Filed pursuant to the order of the Court of December 17, 1956, denying the Union's motion to be added as a party.

Relations Board has decided not to exercise its statutory jurisdiction.

This question arises in the three cases in quite different contexts. In the *Fairlawn* and *Garmon* cases, the challenged state action is an injunction against picketing and other forms of economic pressure deemed by Ohio and California, for somewhat different reasons in each case, to violate the policy of the state. The present case is quite different. Unlike *Garmon* and *Fairlawn*, and indeed, unlike most cases in which this question has been presented, the challenged state action is an administrative order issued by a state labor relations board against an employer as a result of unfair labor practice findings substantially similar to those which the National Board would have made if it had taken jurisdiction over the case.

The facts in this case, indeed, are so different from those in the *Fairlawn* and *Garmon* cases that they perhaps deserve more emphasis than they have been given by the appellants. In this case the Steelworkers Union filed a petition with the National Labor Relations Board in December, 1953, asking that it be certified as the exclusive collective bargaining representative for the Company employees. An election was held and the Union was certified on May 4, 1954. Thereafter the Union attempted to arrange a meeting for the purpose of negotiation with the Company. It was unsuccessful and on May 17, 1954, it filed a charge with the National Board that the Company had refused to bargain collectively in good faith. Subsequent to the filing of the charge, meetings took place on June 1 and June 23, 1954, and an interim agreement for the handling of grievances was signed. Then, in July, the National Labor Relations Board issued its new jurisdictional standards and on July 21, the Acting Regional Director of the Twentieth Region issued a letter in which he found that further proceedings on the charge

which had been filed earlier by the Union were not warranted because the operations of the Company did not meet the Board's jurisdictional standards.

The impact of this refusal to proceed by the agents of the National Board was immediate. As found by the Trial Examiner of the Utah Board, "After the NLRB decision, the respondents had no further intention of meeting or attempting to negotiate a contract."

The Union then filed a charge with the Utah Labor Relations Board, claiming that the Company had discharged a number of employees for their union activity, that it had interfered with the rights of the employees to engage in collective bargaining and that it had refused to bargain with the Union. The Utah Board sustained the refusal to bargain claim, finding, as stated, that after the NLRB decision the Company had no further intention of meeting or attempting to negotiate a contract with the Union. It also sustained four of the charges with respect to the discharge of employees, two of which took place subsequent to the refusal by the national Board to exercise jurisdiction.

In this case, in short, after the national Board had exercised its jurisdiction by certifying the Steelworkers' Union it then, pursuant to its new standards, refused to proceed further. Immediately upon this refusal, the employer made it clear that, as far as he was concerned, he had no further obligations. But the state board moved in and enforced, through its own procedures and by virtue of its own labor relations statute, the same obligations which the national Board would have enforced had it taken jurisdiction. The question here is whether the state board had power to do so.

We think that this recital of the bare outline of the facts of the case should make it plain that in this case, if in any, the state's action should be sustained. Local counsel for the Steelworkers Union were of the opinion

that the state could act under the circumstances of the case and therefore pressed the claim of the Union before the Utah Labor Relations Board. In the Utah Supreme Court counsel for the Union, as well as counsel for the State Board, urged that the state had jurisdiction and that the Board's order should therefore be sustained. In this Court there are obviously strong reasons why the Steelworkers Union should continue to assert the propriety of the State's action. It is concerned not only with the maintenance of its right to represent the employees here involved, but also with the very practical problem of obtaining for the employees unlawfully discharged by the Company some measure of restitution for the loss that they have suffered because they believed in and worked for the Steelworkers Union.

As we have already indicated to the Court in our motion to be made a party appellee, we have, regretfully, come to the conclusion that there is no reasonable basis upon which we can urge that this Court should sustain the result reached below. We believe that we have an obligation to the Court to explain fully the reasoning which has led us to this conclusion. It will be the purpose of this brief to set forth that reasoning.

As a preliminary matter, however, we wish to make certain premises of our reasoning quite explicit. First, we assume throughout that it is conceded that the Utah Board could not have assumed jurisdiction over this case if the standards for processing cases under which the national Board operated prior to July of 1954 were still in effect. Clearly, prior to that time the Board would have assumed jurisdiction since the employer's entire business consisted of work done under a contract to supply some $85,000 worth of equipment to the United States Air Force and, under the earlier standards, there was no $100,000 minimum in such cases. Equally clearly, under the principles of *Plankinton Packing Co.* v. *Wisconsin*

Board, 338 U.S. 953 (1950) and *Weber* v. *Anheuser-Busch,* 348 U.S. 468 (1955), the state board would not then have had jurisdiction to proceed. We do not understand any party to contend to the contrary.

Second, we assume that the Board's new standards are valid and that the case cannot, therefore, be disposed of by holding that the national Board should have assumed jurisdiction. This we believe to be a questionable premise, particularly if it is extended to an assumption that the Board's refusal to process an election petition in a similar case would be beyond attack. For the reasons we summarize briefly below, at pp. 41-42, we think that the Board's standards are based upon the use of inadmissible criteria and have been adopted for an impermissible purpose. But, unfortunately, none of the parties to this case in this Court have raised this issue. And since the Court on December 17, 1956, denied our motion to be made a party, even though we were parties below, we will not press the point here. We will assume, instead, that since the point was not raised by the parties this Court will neither confirm nor reject the propriety of the Board's standards. And we will set forth the reasons why, even on that assumption, we are forced to the conclusion that the order of the Utah Board cannot be sustained.

SUMMARY OF ARGUMENT

One theory on which state action here can be sustained is that presented by the respondents in the *Garmon* and *Fairlawn* cases and by the 7 Attorneys General: the Board's "jurisdictional" standards should be read as limiting the Act's substantive coverage, just like the exemption of agricultural laborers and domestic servants in Section 2(3). On this theory, the states are free to proceed with respect to enterprises outside the Board's standards wholly without regard to the provisions of the Act.

That this theory cannot be sustained is most easily seen by examining the text of the Act and this Court's decision in *Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 72, (1956). Even the 7 states which here argue for state jurisdiction implicitly assume that the substantive rules of the federal Act apply even where the Board refuses to take jurisdiction.

This conclusion is further demonstrated when we examine the manner in which the Board and the courts have treated cases in which (1) the Board's standards change or (2) the amount of business done by the employer in question changes. In both cases it seems agreed that cases should be disposed of on the theory that, irrespective of the change, the Act always was and continues to be substantively applicable.

The Board's standards, furthermore, do not remove a "precisely defined segment" of enterprise "having intrinsically local characteristics" from the Board's jurisdiction, so that a state body could independently determine whether the Board would or would not take jurisdiction. This is most clearly seen by examining certain examples of the manner in which the Board applies its standards. Such examination shows that the standards do not remove *any* enterprise, as such, from the Board's jurisdiction. They remove certain proceedings. Jurisdiction may be taken over an enterprise in one kind of a proceeding and refused in another, without any change in the amount of business done. Furthermore, the employer over whom jurisdiction is refused in one case may be a far larger enterprise, having a much greater impact on interstate commerce, than the employer over whom the Board decides to act in another. Nor are the Board's standards either precisely defined or static. They are, rather, complex and changeable.

All of these considerations make it clear that the Board's standards cannot be equated to a limitation on

the Act's substantive applicability such as to enable the states either to inhibit conduct which the Act protects or to make their own determination of what proceedings the Board will process.

These objections to state action would be met in a case, such as this one, in which (a) the national Board has specifically refused to act and (b) the conduct prohibited by the state is conduct which the Board itself would prohibit if it had taken jurisdiction. Further analysis indicates, however, that it is not enough that the particular conduct proceeded against by the state is conduct which is also forbidden by the federal Act. For the prohibitions and protections of the federal Act are a complex whole, each part dependent upon the other. If it punishes union action which occurs because the state fails to provide protections for the right to organize or bargain collectively the state may, in fact, be enforcing policy which conflicts with the federal Act even though in the particular case the conduct prohibited by the state is also prohibited by the federal Act. The importance of this consideration is shown by the absence of any protection for these basic union rights in the statutes of the states here seeking to prohibit union conduct.

On the assumption, therefore, that the substantive principles of the federal Act must be regarded as applying to all employers and employees within the Act's own definition of its coverage, we conclude that three conditions are necessary to avoid federal-state conflict in the areas where the Board declines jurisdiction: (1) that the Board refuse to proceed in the particular case; (2) that the conduct proceeded against be conduct not protected by the federal Act; and (3) that the state also provide the counterbalancing protections which the federal Act provides. Where these three conditions are met—as they are in this case—there is no basis for possible conflict.

We would urge a decision along such lines were it not

for the provisions of Section 10(a) of the Act. But Section 10(a) sets out, in terms, almost the precise equivalent of the conditions we have reached by analysis of the other provisions of the Act, with the exception only that Section 10(a) requires a specific agreement with the state and also requires complete consistency between the federal and state statutes. In view of the terms and legislative history of Section 10(a), we do not think that responsible argument can be made that Congress intended to let the courts work out a judicial substitute to deal with the same problem. The precise conditions of Section 10(a) not having been met, we conclude that the state cannot proceed even in a case such as this one.

A decision to this effect would not be catastrophic. Examination of the Board's new standards and the history of their promulgation shows (1) that they were not established to meet a case burden which could not otherwise be handled and (2) that they were established with the intention of transferring jurisdiction to the states. If this Court should hold this effort to be ineffective to accomplish its intended purpose, it is likely that the Board will reassume jurisdiction over much of the "no-man's land." If the Board cannot go all the way, complete freedom from both state and federal regulation of economic practices in the "no-man's land" is far less dangerous to the national labor policy expressed in the Act than would be the imposition of state rules which contradict that policy.

ARGUMENT

I—THE THESIS THAT THE BOARD'S JURISDICTIONAL STANDARDS EXCLUDE A PRECISELY DEFINED SEGMENT OF BUSINESS ENTERPRISE FROM THE SUBSTANTIVE APPLICABILITY OF THE ACT CANNOT BE MAINTAINED.

The simplest proposition which would sustain the state action here is the simple thesis put forward, in this Court,

by the respondent in the *Fairlawn* case, by the states of Florida, Georgia, Texas, Vermont, Virginia and Wisconsin, and by the American Retail Federation, et al., as *amici curiae*. That thesis is that the National Labor Relations Act should be read as if it simply excluded from its coverage the class of cases over which the National Labor Relations Board refuses to act. "The definition of the extent of the application of the law becomes as much a part of its substance as if written into it, or as if incorporated through judicial determination." (Brief for Florida, et al (hereinafter cited as States' Br.) p. 27.)

There being no federal law with respect to those cases, it is argued, there is no possibility of conflict and no basis to argue that a state may not apply its own labor policy, whatever that policy may be. Furthermore, there is no need to find a specific declination by the Board to act in a particular case. The states, in applying their own labor policies and remedies, are free to make the initial determination that a particular case is exempt from Federal law just as if the Board's jurisdictional standards were written, in *haec verba,* into the definition of "affecting commerce" in the federal Act. 29 U.S.C. § 152(7).

But it seems to us plain that this broad proposition is not, and cannot, be correct. There are many reasons for that conclusion, most of which have been set out cogently in the brief for the petitioners in the *Fairlawn* case. The most important of these is that the proposition urged by the states confuses substance and procedure. It ascribes to an indefinite and transitory set of rules as to whether the Board will process cases the consequences of a limitation of substantive law.

A. *The Relationship of the Board's Standards to the Substantive Provisions of the Act*

The error is most plainly seen when the function of the Board's so-called jurisdictional standards is examined in relation to the whole structure of the Act.

When the Board refuses to take an unfair labor practice case, it exercises the discretion which it argues is given it by the provisions of Section 10 of the Act, which provides that "The Board is *empowered* as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce." In refusing to exercise this power the Board does not say, and cannot, say that there has been no unfair labor practice or that Section 8 is inapplicable. It simply says that it chooses not to exercise the discretionary power given it to initiate administrative action to enforce the provisions of Section 8 of the Act.

This is not a case in which a regulatory body is given authority to establish rules and regulations but chooses not to exercise that power. The Board is not empowered to create unfair labor practices by the issuance of administrative regulations. Congress has decided substantively what are and what are not unfair labor practices in industries "affecting commerce." The Board is empowered, on its own theory, only to exercise discretion as to whether to initiate enforcement proceedings to prevent the actions which Congress has decided are unfair labor practices.

Even if it could be argued, somehow, that the Congressional definition of unfair labor practices in Section 8 was limited to the cases in which the Board, under its Section 10 power, decided to initiate preventive or enforcement measures, there remains Section 7 of the Act. Section 7 provides, without reference to unfair labor practices or unfair labor practice proceedings before the Board, a broad basic principle applicable to the full extent of the coverage of the Act:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

Nothing in the Act indicates that this broad grant of rights to employees is to be limited to the cases in which the Board decides to act under Section 10. Contrariwise, as this Court has so recently held:

> "The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." *Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 72,74.

The contention of the seven states that the entire Act is simply inapplicable to enterprises concerning which the Board refuses to act is further confounded if we look at the provisions of Section 9(a). Section 9(a) provides, again without reference to the Board or its proceedings, that:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect:

Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

The Board is given power by Section 9 to conduct elections and issue certifications, upon petition, where there is doubt as to who is the collective bargaining representative or what is the appropriate unit. But the right of a union to act as the collective bargaining representative of employees, granted by Section 9, has never been deemed to depend upon whether the Board has conducted an election or issued a certificate. It has always been assumed, and rightly so, that the right to collective bargaining, and the employer's correlative duty to recognize the union for that purpose, flows from the terms of the Act itself not from a Board certification. *N.L.R.B.* v. *Bradford Dyeing Ass'n,* 310 U.S. 318 (1940). In 1947 the House proposed to amend the Act so as to require a recalcitrant employer to bargain only with a certified union. H. Rept. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 321. The Senate refused to make the change and in conference its views prevailed. See 93 Cong. Rec., 4578 (1947).

In sum, the Board's refusal to institute unfair labor practice proceedings under Section 10 or to conduct elections under Section 9 cannot possibly be equated to the failure of a regulatory body to issue rules. It is a refusal by the body charged with enforcement and prevention duties to enforce rules established by the statute itself.

There *is,* to be sure, a theory upon which the adoption of so-called jurisdictional standards by the Board could be said to make the federal statute totally inapplicable. That theory would posit that the Board's standards constitute, not a refusal to process cases within the Board's jurisdiction, but an administrative definition of the term "affecting commerce" which defines the limits of the statutory coverage.

No party has presented such a theory here. And for

good reason. First, the Board has explicitly stated that this is neither the purpose nor intention of its rules. *East Newark Realty Corp.*, 115 NLRB 483, 37 LRRM 1328 (1956). Second, if the standards purported to be a practical definition of "affecting commerce" they could not stand, since, as the Board has itself recognized, they exclude many enterprises which are the very channels and instrumentalities of interstate commerce, *Mid-West Car Pool Assn.*, 114 NLRB 721, 37 LRRM 1023 (1955); *Rollo Transit Corp.*, 110 NLRB 1623 (1954),[2] and others which are "essential" to interstate commerce. *East Newark Realty Corp., supra.*

Finally, the Board's standards do not, as the seven states say, simply remove a "precisely defined segment of intrastate enterprise" from the scope of the Act.[3] The Board's standards establish rules to decide whether the Board will entertain certain proceedings, not rules limiting the Act's substantive applicability. Whether a proceeding relating to a particular enterprise will be entertained may depend, as we shall show below, on the nature of the proceeding, the date on which the hearing is held, and the prior actions of the parties. Jurisdiction may be exercised with respect to the same enterprise in one kind of proceeding but refused in another. And if the Board does proceed in a particular case it proceeds on the assumption that the Act was always applicable

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[2] As Members Murdock and Peterson, dissenting, pointed out in that case: ". . under the majority's new jurisdictional plan, a factory which ships $50,000 *in value* of goods across a state line is sufficiently engaged in interstate commerce to warrant assertion of our jurisdiction. The trucking company, however, which actually transports these goods as well as perhaps hundreds of thousands of dollars in value of other goods across State lines is held not sufficiently engaged in commerce to warrant the assertion of our jurisdiction because it receives $99,000 in cartage fees for such services." 110 NLRB at 1629.

[3] States Br. p. 34.

and will remain applicable, even though the Board's jurisdictional standards were not met at the time the actions in question occurred or at the time the Board's order is enforced.

The correctness of the conclusion that the Board's refusal to initiate unfair labor practice or representation proceedings cannot have the effect of totally withdrawing the applicability of the Act is illustrated by the simplest hypothetical case. Suppose that a state adopted a statute making it unlawful to organize, to strike or to picket. Such a statute clearly would not be contrary to the National Labor Relations Act if it applied only to agricultural laborers or domestic servants who are specifically excluded by Section 2(3) from the coverage of the Act. Indeed Louisiana has by court action adopted such a rule with respect to sugar plantations during the harvesting season. *Godchaux Sugars Inc.* v. *Chaisson*, 78 S.W. 2d 673, 35 LRRM 2515 (1955). Whatever its other constitutional infirmities may be, that rule clearly does not conflict with the National Labor Relations Act since it is limited to agricultural labor.

Could such a rule similarly be applied to organizations of employees in enterprises "affecting commerce" over which the Board had refused to exercise jurisdiction? It seems plain to us that it could not. We need not even argue the proposition because it appears to be plain even to the seven states who argue here for unlimited state jurisdiction. For they say, on pp. 26-27 of their brief:

> "It is not to be presumed that any state would act in such a manner, if permitted to regulate, as to deprive citizens of federally guaranteed rights. If there should be an overstepping it *could be tested in the same manner as in previous cases where state regulation has been challenged.*" (Emphasis added)

And they cite for this proposition the very cases in

which this Court has struck down state action with reference to enterprises over which the Board would assert jurisdiction.

But on what theory could any state which is "permitted to regulate" have its deprivation of "federally guaranteed rights" tested, if the basis for the state regulation is that the federal Act is inapplicable and, hence, there are no federally guaranteed rights?

The plain fact is that the doctrine advanced by the brief of the seven Attorneys General implicitly contradicts the assumption of their brief. This is shown not only in the passage quoted, but also by the examples cited, in which employers over whom the Board refuses to act discharge union members (pp. 24-25) or refuse to bargain collectively (p. 29) and in which it is argued the states should be permitted to act. In all of these cases it is implicitly assumed that the states' regulation is consistent with the provisions of Sections 7 and 9 of the Act. But the doctrine by which the brief seeks to show that the states can regulate would require no such consistency.

B. ***Changes in Standards and in the Amount of Business***

That the Board's decision not to take jurisdiction cannot be deemed to limit the substantive applicability of the Act's provisions—and thus to free the states to apply their own labor policies—is clearly demonstrated by examination of what happens (1) when the Board's standards change and (2) when changes take place in the volume of an employer's business which determine whether the Board will take jurisdiction. In both cases it will be seen that both the Board and the courts have rightly treated the Board's standards as defining only the proceedings which the Board will process, not as defining a segment of commerce to which the substantive provisions of the Act are not applicable.

(1) *Changes in Board standards.* In *Coca Cola Bot-*

tling Company of Stockton, 110 NLRB 840 (1954) the Board announced its procedure in dealing with concluded proceedings which, under the new standards, it would not have initiated. It said that as to all cases in which a decision and order had already been issued, "the Board will proceed with compliance, enforcement and contempt proceedings, depending upon the status of the case, without regard to whether the particular case meets the revised jurisdictional standards." Id at 843. The courts have concurred in the power of the Board thus to proceed. *NLRB* v. *Stanislaus Implement Co.,* 226 F. 377 (9th Cir. 1955); *NLRB* v. *Kartarik, Inc.,* 227 F. 2d 190 (8th Cir. 1955).

A Board decision, however, does more than adjudicate past violations. It directs future conduct. And so in the *Stanislaus* case the court, at the Board's request, issued an order more than a year after the Board's new standards were announced, directing a company over whom the Board would not then take jurisdiction to bargain in the future with the Machinists Union. Similarly, in the *Karatik* case, the employer was directed in November, 1955, to begin collective bargaining with the same union. Neither court even thought to question that the substantive duty thus enforced continued to survive the adoption by the Board of its restricted standards as to what cases it would prosecute.

An even clearer demonstration is supplied by *Richland Laundry & Dry Cleaners,* 112 NLRB 294 (1955). In that case the Board in 1951 had ordered the company to cease recognizing a union which had been unlawfully assisted unless and until that union had been certified. In April, 1955, the question was raised as to whether the Board should process a petition by the same union for an election, even though under the standards then in effect the Board would not ordinarily take jurisdiction. The Board decided that it would conduct an election. Pre-

sumably if the union won the election it would be entitled under the federal statute to require the employer to bargain with it. Certainly state action forbidding it to do so would present the plainest kind of conflict with federal law, even though the enterprise was clearly outside of the "segment" of commerce comprised by the Board's jurisdictional standards.

(2) *Changes in volume of business.* In administering its jurisdictional yardsticks, the Board has uniformly decided that the determinative period to be considered in measuring the employer's business is not the year in which the unfair labor practice occurred, but the calendar or fiscal year immediately preceding the year in which the hearing is held, or the prior 12 months if figures as to such a period are available. *Aroostook Federation of Farmers,* 114 NLRB 538, 36 LRRM 1611 (1955). In industries where the amount of business done fluctuates from year to year, the question of whether the Board will take jurisdiction thus depends upon the date the Board's hearing is held. Thus, in one case, the Board refused to take jurisdiction where it was shown that in the year preceding the hearing the business done by the employer had not measured up to the Board's standards, even though in a number of years prior thereto it had exceeded the standards. *Western Machine & Tool Co.,* 115 NLRB 978, 37 LRRM 1467 (1956). On the other hand, an employer cannot defend against an unfair labor practice or representation proceeding on the ground that he has sold part of his business and the portion remaining at the time the unfair labor practice occurred, or the election will be held, does not measure up to the Board's standards. *Whippany Motor Co.,* 115 NLRB 52, 37 LRRM 1234 (1956). Jurisdiction would be assumed because he had done sufficient business to meet those standards in the year prior to the hearing. Presumably, if in such a case the union delays its charge or petition until

after the close of the year, or the Board delays its hearing, then the employer, if he can show that the business in a completed year has fallen below the Board's standards, could escape the Board's jurisdiction.

These rules can be justified if it is conceded that the Board's standards serve merely to define what cases the Board will handle. They would, of course, be nonsense if it were assumed that the rules of conduct prescribed by the Act apply only where the Board's standards are met. For, if that were so, an employer whose business was increasing could be called upon to justify actions taken when he was not subject to the Act and an employer whose business was declining would be forced to comply with a non-existent duty to bargain in the future.

C. *The Nature of the Board's Standards*

One additional difficulty with the approach of the seven states and the respondents in the *Fairlawn* and *Garmon* cases is that they make certain assumptions about the nature of the Board's standards which are erroneous.

Thus, the seven states assert that the Board's standards set aside a "precisely defined segment" of enterprise which, by a strictly mathematical calculation, can be found to be outside the area in which the Board will act. This assertion, as well as the assertion that the Board's standards exclude only an area "having intrinsically local characteristics" [4] can be made only by those unfamiliar with the nature of the Boards standards.

The standards, it is true, are phrased in mathematical terms. It is also true that, under each particular subprovision of the standards, enterprises doing less than the amount of business specified are excluded and those doing a greater amount included in the cases on which the Board will act. But because of the variety of sub-stand-

[4] *Breeding Transfer Co.*, 110 NLRB 493, 496 (1954), quoted in State Br., p. 5.

ards and their complex and often undefined relationships, it does not follow either that the segment of enterprise which is excluded is precisely defined or that it is more "essentially local" than the included segment. Indeed, to the contrary, in many instances the larger the enterprise and the greater its impact upon interstate commerce the less likely it is that the Board will take jurisdiction. Furthermore, the question of whether the Board will or will not assume jurisdiction may not depend at all upon any mathematical computation relating to the amount of its business but upon the nature of the proceeding sought to be instituted before the Board or the kind of employee or employer conduct alleged to be involved.

A few examples will, we think, plainly demonstrate these characteristics of the Board's standards.

1. *Retail Stores.* One of the Board's new standards sets up specific standards for single retail stores or chains of stores located in one state. To assert jurisdiction there must be direct out-of-state purchases of $1,000,000 or indirect out-of-state purchases of $2,000,000, or direct out-of-state sales of $100,000.

Different standards, however, are applied to interstate chains. Jurisdiction will be assumed over such chains only if total sales of the entire chain are $10,000,000 irrespective of the portion which moves in interstate commerce, unless the stores in each state meet the intra-state standard. It is plainly possible for a single store (or a group of stores) within one state to meet the *intra*-state standard even though the chain of which it is a part does not meet the *inter*state standard. In this situation, the Board will still refuse to entertain a representation case in which a union asks that an election be conducted in the *interstate* enterprise. *Deskins Super Market,* 115 NLRB 1571, 38 LRRM 1121. But, on the other hand, if the same union should file a petition asking for an election only in one store, or only in the stores in one state, *in the*

same chain, and the first standard is met, the Board will entertain the petition and conduct an election in this smaller unit. *Greenberg Mercantile Corp.,* 112 NLRB 710 (1955); *Missco, Inc.,* 116 NLRB No. 163, 38 LRRM 1441 (1956).

2. *Multi-state non-retail enterprises.* The same kind of a situation was presented to the Board recently in connection with multi-state non-retail businesses. The numbers, in the case of non-retail businesses, are different than in the case of retail stores. But the same duality of standards exists. And, so, in *Dixie Coca Cola Bottling Co.,* 116 NLRB No. 38, 38 LRRM 1244 (July 25, 1956) the Board declined to conduct a company-wide election in an interstate enterprise even though it expressly conceded that, in an appropriate proceeding, it might assert jurisdiction over the portion of the employer's operations in a single state. *Id* at 38 LRRM 1245.

In neither this category nor in the retail chain store category has the Board decided, so far as we know, how it will handle unfair labor practice cases which occur before a bargaining unit is established. If an employee is discharged for union membership and files a charge with the Board, will the Board apply the standard for the store or plant in which he worked, all of the stores or plants in the state, or all of the stores or plants in the chain? Perhaps it will make the answer depend upon the degree of centralization of control over labor relations matters—as in the corporate entity cases discussed below. If so, it may very well be that the charge will be entertained if the employee was discharged by a local manager having considerable autonomy in formulating labor relations policy but dismissed if the discharge was pursuant to a policy applicable to the entire interstate operation.

3. *Secondary Boycott Cases.* If an employer files a

charge that a union has violated Section 8(b)(4) of the Act by engaging in a secondary boycott, the Board will take jurisdiction if the total business of all of the affected employers, lumped together, meets the standards which are otherwise applied to single employers.

Thus, if a union should petition for an election among the employees of employer A, the Board would refuse to take jurisdiction if A's business did not meet the Board's standards. If the union, in order to obtain recognition, then exerted secondary economic pressure upon Employer A by persuading the employees of employer B not to handle his goods, the Board would take jurisdiction over a complaint against the union if the business of employer A and B together add up to the total requirement by the Board to take jurisdiction. If the boycott involves a number of employers, all of their businesses will be similarly lumped together. *Teamsters' and McAllister Transfer, Inc.*, 110 NLRB 1769 (1954).

The result of this rule is plainly to make the Board's assertion of jurisdiction depend upon the kind of a charge filed with it. The Board will not hear a simple refusal to bargain case or a discriminatory discharge case with respect to any of the involved employers. But it will hear a a charge that there has been a secondary boycott and, in that event, will also hear any charges of employer unfair labor practices which may be involved in the same labor dispute. *Reilly Cartage Company*, 110 NLRB 1742 (1954).

4. *Employer Associations.* If there is in existence an employer association which bargains as a unit with a union the Board will permit the business of all of the members of the association to be added together in determining whether the jurisdictional standards are met. However, under established Board rule, an employer may take himself out of such a bargaining unit by the simple

device of resigning from the association.[5] The question then, in dealing with a proceeding involving the employees of a particular employer, may be whether he has manifested an intention of being a member of an employer association for purposes of collective bargaining. If he has, the Board will take jurisdiction.[6] If he has not, or if he has resigned from the association, the Board will refuse jurisdiction in the absence of any showing that the business of the individual employer is sufficient to meet the Board's standards.[7] Whether or not the Board would take jurisdiction cannot be ascertained from the employer's business but only from the evidence as to his relationship with the association at the time the unfair labor practice occurs.

5. *Public Utility and Transit Companies.* One of the bases upon which the Board will assume jurisdiction is the provision of goods or services in the value of $100,000 or more to enterprises which directly meet the Board's interstate commerce standards.

This is the so-called "indirect outflow" or *Jonesboro Grain Drying*[8] standard. The Board also has a specific limitation, known as the *Greenwich Gas*[9] standard, that it will not take jurisdiction over a transit company or other public utility unless it grosses $3,000,000 a year. What of the case in which a transit company or public

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[5] See, e.g., Bearing & Rim Supply Co., 107 NLRB 101 (1953) and cases cited in Truck Drivers Local Union v. N.L.R.B., 281 F. 2d 110, 115 (2d Cir. 1956) cert. granted No. 103, October Term, 1956, 352 US 818.

[6] Insulation Contractors, 110 NLRB 638 (1954).

[7] Carpenters Union (Ellinwood Corp.) 115 NLRB 43, 37 LRRM 1229 (1956). In this case a complaint against union unfair labor practices was dismissed because the record did not show that at the time of the commission of the acts the company had "manifested an unequivocal intent . . . to participate in . . . multiemployer bargaining."

[8] 110 NLRB 481.

[9] 110 NLRB 564 (1954).

utility provides goods or services valued at more than $100,000 to an enterprise over which the Board would exercise jurisdiction? Will the indirect outflow standard be utilized as a basis for asserting jurisdiction even though the company does not meet the standards for a public utility or a transportation company?

The answer, it seems, depends in some cases upon whether the only impact of the operation of the company involved upon the community is its provision of services to the interstate employer. If the company, as in *Potash Mines Transportation Co.*, 116 NLRB No. 179, 38 LRRM 1460, performs services only, or in major part, on a private basis for the interstate enterprise then the Board will assume jurisdiction. If, on the other hand, the company serves a broader section of the community and its services for particular employers, although as much as in the first case, are only part of its total public service, then the Board will not assert jurisdiction. "If the Greenwich Gas standard applies, the standard enunciated in Jonesboro . . . do not." *East Newark Realty Corp.*, 115 NLRB 483, 37 LRRM 1328, 1329 (1956).

Similarly, if an enterprise supplies coal or water, or any other materials or services in the amount of more than $100,000 to interstate industrial firms, the Board will assert jurisdiction. But, if it in addition supplies these same materials or services on a public basis to the community in general, jurisdiction will be refused. *Gary Hobart Water Corp.*, 115 NLRB 1575, 38 LRRM 1123 (1956).

On the other hand, if water, steam and electricity are supplied on a private basis by a firm which does not offer its services to the general public but supplies them in connection with the lease of an industrial building to manufacturers subject to the Act, then the $3,000,000 public utility standard, not the *Jonesboro* standard, will be applied. *East Newark Realty Corp.*, 115 NLRB 483, 37 LRRM 1328 (1956).

6. *Restaurants and Cafeterias.* The distinction which the Board draws between private utilities (except lessors) and public utilities it refuses to draw in the case of restaurants and cafeterias. In such cases, the Board refuses to apply its direct and indirect inflow standards with reference to the enterprise's own purchases, or the indirect outflow standard with reference to the services supplied to an interstate manufacturer. Instead, the Board uses the standard applicable to retail stores, viz: a gross business of $10,000,000 annually.[10] And this standard is applied even to industrial catering enterprises whose only business it is to supply in-plant meals on a contract basis to manufacturers engaged in interstate commerce. Thus, a concern which washes windows in an industrial plant engaged in interstate commerce, at a cost of $100,000 or more, is subject to the Board's jurisdiction, even if none of its own business is interstate.[11] If the service is a public utility, however, the Board will not take cases involving it unless its total business is $3,000,000. On the other hand, if it prepares and serves food, even on a private basis, the Board will not take jurisdiction unless the gross business is $10,000,000 even though the enterprise itself purchases goods valued at more than $1,000,000 shipped directly and indirectly from out-of-state and it does no business with the public generally. *C. R. Brown Cafeterias,* 115 NLRB, 1772, 38 LRRM 1166 (1956).

7. *Inter-related and Subsidiary Companies.* Where several corporate entities are involved in the same general business enterprise, it is almost impossible to tell whether the Board decision to assert jurisdiction will be based on the aggregate business of the separate corporate entities or whether they will be separately considered. The Board sometimes decides both ways with respect to the same enter-

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[10] Bickford's Inc., 110 NLRB 1904, 35 LRRM 1341 (1954).

[11] City Window Cleaning Company, 114 NLRB 906, 37 LRRM 1062 (1955).

prise. Compare *Orkin Exterminating Co.*, 115 NLRB 622, 37 LRRM 1365 (1956) with *Orkin "The Rat Man", Inc.*, 112 NLRB 762, 36 LRRM 1102 (1955). That the various corporations are integral parts of the same business, have common ownership and control, and even common officers and directors, is not necessarily sufficient to show that they should be considered together. *Moving Picture Machine Operators*, 115 NLRB 952, 37 LRRM 1450 (1956). The Board has looked rather at questions of whether there is centralized control of labor relations matters or employee interchange—questions which are normally relevant in determining the appropriate collective bargaining unit.[12] See Murdock dissenting, in *Orkin Exterminating Co., supra*. A given corporate combination, therefore, can either be within or outside the Board's standards depending upon whether it is decided to have one labor relations director for the group or to have several. And this status can, of course, change from time to time irrespective of any change in the combine's total business or its effect upon interstate commerce.

8. *Conclusion.* This brief excursion into the intricacies of the Board's standards should serve to demonstrate conclusively that the Board's new standards do not carve out any segment of commerce, local or otherwise, from the Board's jurisdiction. It is impossible to identify the enterprises or the employees excluded by the Board's standards. It is possible only to say, and this without any precision, that the Board will not entertain certain proceedings. Whether the Board will take jurisdiction may depend upon the nature of the proceeding, the date of the hearing, the manner in which the enterprise's labor relations policies are formulated and implemented, the past history of collective bargaining, the unit asked for, or the kind of unfair labor practice charged.

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[12] The test is, of course, never applied in determining whether to take jurisdiction over a single corporation, which may have hundreds of separate bargaining units within the individual corporate enterprise.

Nor is it true, even with respect to these questions, that the Board's standards "have remained static" since 1954, as stated by the respondent in the *Fairlawn* case (Brief, p. 67). There have been innumerable changes in the 1954 standards since they were first adopted.[13] As the Board has itself recently reiterated, the Board in 1954 indicated that its standards covered only "a number of typical situations then presented for decision" and "as additional typical cases arose, the established standards would be re-evaluated and additional standards would be established . . ." *Coca Cola Bottling Co. of New York*, 114 NLRB 1423, 37 LRRM 1176, 1177.

Finally, examination of the standards and their method of application makes it crystal clear that no state court can

[13] Thus, the Board announced in July, 1954, that it would never take jurisdiction over restaurants. On December 16, 1954, however, it decided that it would take jurisdiction if the employer's gross volume of sales annually was $10,000,000. Bickford's Inc., 110 NLRB 1904. In January, 1955, the Board decided that rural electric cooperatives were analogous to public utilities and that its public utility standard should therefore be applied to them. Clay Electric Cooperative, Inc., 111 NLRB 175. Then, in August, 1955, it decided that jurisdiction would be taken with respect to such cooperatives if they met the Jonesboro tests, even though not the public utility test, if their business was wholesale rather than retail. Central Electric Cooperative, 113 NLRB 1059. In December, 1955, the Board decided that it would assert jurisdiction over multistate, non-retail enterprises which did not meet its July, 1954 standards as to interstate sales if such enterprises grossed $3,500,000—an entirely new standard. Coca Cola Bottling Co., 114 NLRB 1423, 37 LRRM 1176. In January, 1956, the Jonesboro standard was revised by dropping the distinction between sales of goods and services "directly utilized" by a purchaser and other sales. In the former case the minimum sales requirement was originally $100,000, in the latter $200,000. From and after January 12, 1956, only $100,000 was required in either case. Whippany Motor Co., 115 NLRB 52, 37 LRRM 1234.

In addition to these decisions which expressly changed the texts of the standards, there were innumerable decisions which, by the process of creative interpretation, substantially changed their impact. See, e.g., Reliable Mailing Service, 113 NLRB 1263 (1955); Tanner Motor Tours, Ltd., 112 NLRB 275 (1955); Local 1976 (Sand Door and Plywood Co.), 113 NLRB 1210 (1955).

possibly be competent to predict with any certainty whether the Board will or will not take jurisdiction over any particular proceeding. The Board's rules are not only changeable. They are also extremely complex, even in cases where the applicable principles are not in controversy.

So that the Court may have some idea of the kind of reasoning involved in actually applying the Board's standards we reprint, as appendix A to this brief, the text of the Board decision in *Star Garter Co.*, 114 NLRB 957, 37 LRRM 1071, a relatively non-controversial case in which established Board principles were applied. As a realistic matter, it would be only coincidence if a state court *nisi prius* judge who is asked to determine, without benefit of a prior Board ruling, whether the Board would take jurisdiction in such a case would come out with the same answer as the Board. It is not only that the reasoning is esoteric. The source of the "law"—the texts of the Board's decisions—is also frequently unavailable to such courts. And the actual decision, even if the principles are understood, may depend on how much specific information can be procured in the particular proceeding about business enterprises not even involved as parties. The Board's so-called jurisdictional rules, in sum, resemble the statutory principles which the Board enforces, gaining specific content only as they are applied on a case-by-case basis.[14]

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[14] The truth of this observation is borne out by the fact that although the Board's standards were adopted in mid-1954, and have since been enforced in the Board's regional offices so that no cases not meeting those standards should have been processed to the Board, still in 1956 the Board has decided more than 30 cases involving jurisdictional points of more than a routine nature. This total was arrived at by counting the cases deemed to have general enough significance by the Bureau of National Affairs to be designated in their Labor Relations Reference Manual as being "Significant Rulings." The total number of cases reaching the Board itself which involve decisions based on its jurisdictional standards is presumably much larger.

There is a very real and substantial possibility of conflict, therefore, if the states are to be free to make the initial determination as to whether a given case meets the Board's standards. And we therefore conclude that if the states are to handle any cases which the Board refuses to process there should be, at the very least, a decision by the Board or by one of its regional offices that the case will not be handled. Certainly if there is any controversy as to whether a particular proceeding would or would not be processed by the Board that controversy should not be resolved in a state proceeding subject only to review in this Court.

II—TO INSURE CONSISTENCY WITH THE FEDERAL ACT IN CASES WHICH THE FEDERAL BOARD REFUSES TO HANDLE IT IS NOT ENOUGH TO LIMIT STATE ACTION TO THE PROHIBITION OF CONDUCT UNPROTECTED OR FORBIDDEN BY THE FEDERAL ACT.

As a result of our argument so far we conclude: (1) that it is impossible to equate the Board's "jurisdictional" standards with a definition of the scope of the Act's substantive coverage; (2) that the basic principles and the rights conferred by the Act must be regarded as governing all enterprises within its statutory scope, irrespective of the Board's refusal to police violations of those rights in some cases; and, finally, (3) that the Board's standards are such as to make it clearly impossible for any other agency than the Board itself to determine routinely whether a particular proceeding will or will not be heard by the Board.

These conclusions, however, are not sufficient to define the answer to the question posed by this case and the *Fairlawn* and *Garmon* cases. Suppose that, as in this case and arguably perhaps in the *Garmon* case, it can be shown that the National Board, or its duly designated agent, has declined to take jurisdiction over the particular controversy. Suppose further that, again as in this case and perhaps arguably in the others, it also can be shown that the particular conduct

which the state is seeking to prevent or to punish is conduct which the Board, if it took jurisdiction, either (a) would not protect under Section 7, or, *a fortiori* (b) would itself prohibit as an unfair labor practice under Section 8? Where is the possibility of conflict between state law and the federal policy in such cases? Why should not this Court say that if these two criteria are met, as they clearly are in this case, the state action can stand?

There are two difficulties. One of them has already been admirably stated in the *amicus curiae* brief of the AFL-CIO. This is that the precise limits of the substantive protections and prohibitions of the Act are necessarily indeterminate. The Act provides merely general principles whose exact meaning only appears as the Board applies them to particular cases. If state action is to be tested, on a case-by-case basis, by whether it restricts substantive rights conferred by the federal statute, then each state court or board must necessarily determine, in each such case, the contours and limits of the federal statute, with federal review only, and in the first instance, in this Court.[15]

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[15] The nature of the difficulty thus created can be illustrated by exploring one small segment of this problem: the use of vulgar language on a picket line.

One kind of conduct which the Board has recently called "unprotected", in addition to slowdowns, concerted refusals to work overtime, the distribution of "indefensible" leaflets, and similar activity, is the use of coarse or vulgar language. In *NLRB* v. *Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953) the Fourth Circuit refused to enforce an order of the Board ordering reinstatement of certain employees saying that the Act did not "protect them in using insulting and profane language." The Board has taken this ruling to its bosom (*Nutone, Inc.*, 112 NLRB 1153 (1955), *enforced as modified, Steelworkers* v. *NLRB*, 39 LRRM 2103 (D.C. Cir., 1956); *American Tool Works*, 116 NLRB No. 247, 39 LRRM 1072 (1956)), despite earlier contrary judicial decisions. (See, e.g., *Republic Steel Corp.* v. *NLRB*, 107 F. 2d 472, 479 (3d Cir. 1939), *cert. denied*, 389 U.S. 684.

One difficulty with the Board's new rule is that no one without access to the Board's files can tell where the line is. The Board has neither published a lexicon of permissible usage nor even stated in its

The second and perhaps the more important difficulty is that a showing that the particular conduct proceeded against by the state in a given case is unprotected or forbidden by the Act is not sufficient to show that the state is enforcing a policy consistent with the Act. It is not so sufficient because the prohibitions and protections of the Act constitute a mutually inter-dependent system each part of which was enacted in the light of and in reliance upon the existence of the other parts.

The judgment of Congress or the Board that a particular kind of conduct should be protected or prohibited is not made by considering that kind of conduct in isolation from other regulation but only in the context of the whole system of rights and remedies provided by the federal statute. Both employers and the Union use many methods for achieving their objectives. What Congress purported to do was to establish the rules, to outlaw certain practices and to pro-

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published decisions the language found to be impermissible. The best one can do is to find this kind of statement:

> "Thus, in *Efco Mfg. Co., Inc.*, 108 NLRB No. 52, 33 LRRM 1516, 1518, decided April 15, 1954, the Board drew the line between the following two cases, ordering reinstatement in the first one and denying it in the second: (a) The striker called a non-striker a 'wop-bastard,' challenged a company official to a fist fight as a means of settling the strike, and called him 'yellow' when he failed to accept the challenge. (b) The striker ascribed to a non-striker the capability of committing an act so foul as to be unmentionable.
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> "Those criteria may properly be applied to the present case, as representing the latest views of the Board (though they do not, of course, constitute a precise or complete standard covering the full field of misconduct via profane and indecent language)." Nutone, Inc., 112 NLRB 1153, 1172 (1955).

If the standard to test state action is to be whether it interferes with activity protected by the federal Act, the question of state jurisdiction in any case in which there is picketing accompanied by vulgar language may depend upon whether the language used more closely resembles "wop-bastard," in which case it is protected, or resembles the capability of committing an act so foul as to be unmentionable, in which case the state can act.

tect others, and thus to channel the course of industrial controversy into the forms believed fairest and most conducive to the general welfare. Certain practices were prohibited because other means of achieving their objectives were made available and, indeed, were protected. Giving force to the prohibition without at the same time offering the counterbalancing protection distorts the Congressional scheme as much as a prohibition of conduct which Congress has protected.

Consider, for example, the provisions of Section 8(b)(4)(B) of the Act prohibiting the use of the secondary boycott to compel an employer to recognize a union not certified by the Board. If employer A refuses to recognize a union and the union then seeks to secure recognition through a refusal by the employees of employer B to handle A's products, the union's actions are clearly an unfair labor practice and may be, and indeed must be, enjoined by the Board under Section 10(1) of the Act.

But it is equally clear this prohibition of the secondary boycott was enacted by Congress only on the expressed premise that the rights of the employees of employer A to organize and bargain collectively was protected by the Act. Hence any use of secondary pressure instead of the election and unfair labor practice procedures of the Act was believed to be unjustified.

Thus, in the debates on the Taft-Hartley Act, Senator Pepper objected to the provision against secondary boycotts, citing the case in which a lumber manufacturer had refused to recognize a union and discharged the employees who sought to organize one. He argued that it was improper in such a case to prohibit the employees of a processing company from refusing to process the lumber manufactured by the first employer. Senator Taft answered this objection by pointing out that "the Senator's first assumption is not correct, because under the Wagner Act the workers have the right to organize and to require the employer to bargain

with them; and if the employer fails or refuses to do so, his action in that respect is an unfair labor practice.[16]

Even Senator Morse, who opposed the other secondary boycott provisions of the Act, supported a prohibition of "a secondary boycott designed to force an employer to recognize a union." "By this device," he said, "labor unions attempt to organize employer A by bringing economic pressure to bear upon employer B. It seems to me that with the democratic election machinery of the Wagner Act available, and with the provisions according federal protection to employees in their efforts to organize, it is no longer legitimate for labor to engage in this type of conduct." [17]

The secondary boycott is only one example. The use by a union of slowdowns and other tactics said by the Board to be "unprotected" by the Act surely must be differently regarded in the context of a statute preventing an employer from discriminating against strikers than in the absence of such protection. And the use of threats against an employee if he does not join a union—which the federal Act prohibits—can hardly be said to be contrary to the national labor policy if the employer is permitted to threaten employees that they will lose their jobs if they *do* join.

It is not sufficient, therefore, to say that in a particular case the union conduct, such as a secondary boycott, which an employer seeks to prevent in a state proceeding is not conduct protected by the federal Act. Such conduct may have resulted from prior actions which, if the federal Act had been applied, would have been forbidden. Denied recourse to the remedies provided in the federal Act by the refusal of the Board to act, unions may often be compelled to use, as a substitute, methods of self-help which have been placed outside the protection of the federal Act or forbidden by it precisely because the federal Act itself provides other remedies. If the state does not provide those

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[16] 93 Cong. Rec. 4198.

[17] 93 Cong. Rec. 1844.

remedies, the net effect of its action against the use of self-help is to make applicable, in that state and to unions covered by the provisions of the federal Act, a policy which contradicts that of the federal Act.

That these considerations are not purely hypothetical is illustrated by the facts in the *Fairlawn* case and by the brief which the Attorneys General of Florida, Georgia, Texas, Vermont, Virginia, Wyoming and Wisconsin have filed in support of the validity of state action in this area.

There can be no question that in *Fairlawn* the union actions which the state seeks to prohibit followed, and were a result of, employer actions in violation of the federal Act. But Ohio provides no remedy for employer interrogation of employees as to their union affiliation, or for a refusal to bargain. Nor does it provide any mechanism by which employees can register by secret ballot their desire to be represented by a union. It prohibits only the union reaction to the lack of such provisions.

Even more startling is the position set forth in the brief of the seven states. The brief poses a hypothetical case:

> "Let us suppose that such a [rural electric] cooperative declines to bargain with a labor organization representing its employees—a real possibility, because there still remains some unwillingness in unindustrialized rural areas to deal with urban labor representatives. The employees could have no remedy under the federal law. If they are precluded from a remedy under state law they have no recourse but to resort to industrial strife, which it is the avowed purpose of Congress to prevent." (States Brief, p. 29.)

What remedy under state law? As far as we can determine, only Texas and Wisconsin, of the seven states, provide any method by which a union can obtain an election to determine its majority status. And, in Texas, such an election can be held only as a defensive measure in a proceeding

instituted to enjoin picketing after a strike had been called.[18] Only Wisconsin provides an affirmative remedy by which a union can compel an employer to engage in collective bargaining.[19] And, in the given case of an electric supply cooperative, Wisconsin would completely forbid any strike and require compulsory arbitration.[20]

To be sure, the other states have laws relating to labor relations matters. Georgia, for example, has statutes forbidding mass picketing, "unlawful" interference with an employer's business, and picketing to compel recognition of a union.[21] But it has no statutory procedure for the protection of the right to collective bargaining. No employer can be compelled to recognize a union or bargain with it, no matter how many employees choose it.

Virginia has laws, too. They provide for the seizure of public utilities if a strike should occur,[22] they prohibit the use of insulting language on picket lines,[23] they prohibit picketing by anyone other than an employee,[24] they prohibit strikes by government employees,[25] and they limit union action in other ways. But Virginia has no statute protecting the right of employees to organize and to bargain collectively.

Florida, as the AFL-CIO has pointed out in its brief, not only has no statutory procedure for conducting secret elections. It will not even permit its judges to appoint commissioners to hold such elections as an adjunct to a suit to enjoin picketing alleged to be by a minority union.[26]

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[18] Tex. Rev. Civ. Stat. Ann. Art. 5154(g) (1955), Cha. 387, Laws of 1955, approved June 3, 1955, § 3.

[19] Employment Peace Act, Wis. Stat. (1953) §§ 111.01-111.19.

[20] Wis. Stat. (1953) §§ 111.50-111.64.

[21] Ga. Code Ann. §§ 54-801—15-805. See *Woodward* v. *Collier*, 210 Ga. 239, 78 S.E. 2d 526 (1953).

[22] Va. Code Ann. §§ 56-509—56-528.

[23] Va. Code Ann. § 40-64.

[24] *Id.*

[25] Va. Code Ann. §§ 40-65—40-67.

[26] *Thomas Jefferson, Inc.* v. *Hotel Employees*, 80 So. 2d 583, 37 LRRM 2338 (Fla. 1956).

These examples are sufficient, we believe, to illustrate the error not only in the brief of the 7 Attorneys General but also in any general proposition that state action should be sustained in a particular case if it does not transgress substantive rights protected by the federal statute. Such a requirement is necessary, we concede, to show that the state is not seeking to thwart the national labor policy. But it is not sufficient. To show true consistency with the national labor policy it must also be shown, at the very least, that the state not only punishes what the federal Act prohibits but also provides the necessary counterbalancing protections which the federal Act provides.

III—SECTION 10(a) OF THE ACT PRECLUDES THIS COURT FROM PERMITTING THE STATES TO ACT EVEN IN CASES SUCH AS THIS ONE WHERE THERE IS NO INCONSISTENCY WITH THE OTHER PROVISIONS OF THE FEDERAL ACT.

Our analysis so far still does not necessarily require the conclusion that state action of the kind involved in this case should not be permitted to stand.

In this case—although not in *Garmon* or in *Fairlawn*—we have (a) a specific refusal by the national board to proceed, (b) action by a state board which is fully consistent with the federal Act, and (c) a comprehensive labor relations statute which, although it does not exactly correspond with the national Act, does provide at least a guaranty of the basic rights provided for in Sections 7 and 9. We have further, provision for administration of that statute by a single administrative board presumably more competent to understand and, hence, to respect the niceties of the federal statute than a host of common law *nisi prius* courts.

Why cannot the Steelworkers urge that this Court should rely upon these factors, distinguish the *Garmon* and *Fairlawn* cases, and sustain the action of the Utah Labor Relations Board in this case? Aside from the Union's particular

interest in obtaining relief in this case, there is the Union's more generalized interest in having state procedures available to it in all of the cases which the national Board refuses to process under its new standards. Although it is impossible to generalize, it is probably true that in at least some of the states which have enacted comprehensive labor statutes, the Union has more to gain from their operation than it has to lose. Certainly the Steelworkers have no great interest in seeing the Utah statute rendered inapplicable to the broad range of cases over which the National Labor Relations Board has now abdicated its jurisdiction.

The Union would, therefore, welcome a decision along the lines we have suggested, striking down state action such as that involved in the *Garmon* and *Fairlawn* cases and upholding, as consistent with the national labor policy, the action of the Utah Board in this case because it complies with the three conditions we have stated.

We do not argue for this result, however, because we cannot avoid the conclusion that it is precluded by the terms and legislative history of Section 10(a) of the Act.

The three conditions which we think are necessary to establish that state action is not in conflict with the national Act—(1) that the national board has specifically declined to proceed, (2) that a state labor relations statute exists which protects the basic rights guaranteed by the federal Act, and (3) that the particular application of that statute is not inconsistent with the federal Act—are almost the exact counterparts of the restrictions in the proviso of Section 10(a). Section 10(a) permits the states to take jurisdiction if (1) the national board has made a specific agreement to that effect, (2) the state has a labor relations statute consistent with the federal Act, and (3) that statute has not been construed inconsistently with the federal Act.

There are only two differences. The proviso requires that the State acquire jurisdiction by agreement with the Board, not by refusal of the Board to act. And it requires,

as a condition of such agreement, that the state statute be fully consistent, throughout, with the amended federal statute. We see no way to avoid the difficulty that in asking the Court to uphold Utah's action on the basis we have set forth we would be asking the Court to accomplish almost exactly what Congress intended, but by a method different than the one which Congress specified and with somewhat less rigorous restrictions.

That Congress intended the proviso in Section 10(a) to be the method, and the only method, of dealing with the problem of "cases in border-line industries (i.e., border-line insofar as interstate commerce is concerned)" is irrefutable. After all, these are the words which the Senate Committee which drafted the provision used in its report.[27] And this is what the so-called "watch-dog" committee, which contained the principal sponsors of the 1947 amendments, concluded the provision meant.[28] And this is what both the majority and minority in each of the committees of succeeding Congresses which has dealt with this problem has assumed it meant.[29] To present responsible argument to the contrary, however desirable the result, seems to us to be plainly impossible.

We conclude, then, that the federal Act must be read as being substantively applicable to the cases which, while within its coverage, the Board refuses to process. We conclude further that there is such a possibility of conflict with the policy and the provisions of the Act that state action which would not be permissible if the Board would act can be sustained in the cases in which the Board refuses to act only if there is (1) a refusal by the Board to act in the spe-

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[27] S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 26.

[28] S. Rep. No. 986, 80th Cong., 2d Sess., pp. 30-31 (quoted in the brief for petitioners in No. 41, at pp. 80-81).

[29] See S. Rep. No. 99 on S. 249, 81st Cong., 1st Sess., p. 43 (majority views), Part 2, p. 8 (minority views); S. Rep. No. 1211, 83rd Cong., 2d Sess., pp. 17-18 (majority views), Part 2, pp. 14-15 (minority views).

cific case, (2) a labor relations statute providing protection for the basic rights guaranteed by the federal Act, and (3) an absence of conflict with the substantive provisions of the federal Act in the particular application of the state statute. We conclude, finally, that Congress recognized this in 1947 and provided the mechanism by which states could enforce their own laws in cases which are "border-line insofar as interstate commerce is concerned" and, regretfully, we confess that, this mechanism not having been used and the stringent limitations which Congress insisted upon not having been complied with, the action of the Utah Labor Relations Board in this case, although it conforms in other respects to the national policy and presents no possibility of substantive conflict with it, cannot stand.

In coming to this conclusion, we do not share the view of others that the situation thus created is catastrophic. First of all, a remedy for the really pressing cases—the area which the Board has recently abdicated—is readily at hand. The Board can undo what it has done.

This is not as difficult or as unlikely as it may first appear. As to difficulty, the plain fact seems to be that the Board's new jurisdictional standards were not adopted to meet any pressing shortage of funds or inability to handle its case load. That case load was not substantially higher in 1954 than it was in 1950. There was no serious backlog of cases either in Washington or in the field.[30]

Why, then, did the Board adopt its new standards? Plainly because those members who voted for the change wished to accomplish what Congress had said could not be done—the cession of jurisdiction to states not having labor relations laws consistent with the federal Act.

In this connection, a few lines of history are worth many adjectives. In January 1953 a Republican administration

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[30] See the dissent of Member Murdock in Breeding Transfer Co., 110 NLRB 493, 515-518 (1954).

was inaugurated, with the "underlying philosophy," as stated by one of its appointees to the Board, "that the States and communities not only should, but must assume and discharge the responsibility for local affairs." [31] New appointments to the Board followed as the terms of sitting members expired. In July 1953, Chairman Farmer took office. In August 1953, Member Rodgers took office. Finally, in March 1954, Member Beeson took office. This completed the necessary majority and in July 1954 the new standards were adopted, over the dissent of the other two members.

In the interim, Chairman Farmer and Member Rodgers were not averse to stating publicly what their views were. In January, 1954, Chairman Farmer made a speech saying that he strongly advocated a withdrawal of NLRB jurisdiction so that there would be a revival of interest by local government in solving the problems of local people. Member Rodgers in March, 1954, publicly urged that the first task of the new members of the Board should be to free itself of hundreds of cases which should be dealt with by the localities and the States.[32]

The actual decisions of the Board which announced the new standards were, of course, more circumspect. But the sequence of events and the nature of the Board's new standards strongly suggest the correctness of the conclusion, which Member Murdock drew in his dissent in the *Breeding Transfer* case,[33] that the purpose of the new standards was to permit the states to act in cases which the new Board members thought appropriate for state action. Indeed, the Board's standards themselves make it clear that they are not based on any attempt to separate business which is primarily local from business having a substantial effect on commerce. The

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[31] Member Rodgers, quoted in Member Murdock's dissent, *supra*, at p. 503.

[32] The speeches are set out in fuller detail in Member Murdock's dissent in the Breeding Transfer case, 110 NLRB 483, 502-503.

[33] *Ibid.*

only rational explanation, for example, for the Board's refusal to apply its $50,000 direct outflow standard or its $100,000 indirect outflow standard to public utilities, although it does apply them to non-public utilities, is that it is more appropriate that the states govern labor relations matters in the former case since such utilities are otherwise closely regulated by the state while non-public suppliers are not. Certainly no distinction can be drawn between them in terms of their effect upon commerce.

Nor have the new standards, by all evidence, substantially lightened the work load of the Board. To the contrary, the astonishing complexity of the standards and the number and variety of decisions interpreting, applying and revising them, as well as the substantial number of dissents, makes it reasonable to guess that as much time has been used at the Board level in debating about the jurisdictional standards as would have been used in deciding all of the cases which the Board now refuses to take, the great majority of which would have been routinely disposed of on the merits. And it is also not unreasonable to guess that the same proposition holds true in the regional offices of the Board, where most cases are in fact disposed of. Instead of handling cases, the time of the Board's personnel has been involved in the intricate discovery and application of standards adopted by the Board to avoid handling cases.

If this Court should hold, as we believe it must, that this attempt to turn power over to the states without benefit of recourse to Congress cannot succeed, the Board will have no great difficulty in reassuming jurisdiction over the area from which it has withdrawn. And if we are correct as to the underlying reason for the original action, its failure to achieve the desired transfer of power will make it not only easy but likely that this will occur.

As for the remaining and we believe relatively unimportant area, over which the Board never asserted jurisdiction, we do not share the view that great distress will be

created, even in the absence of Congressional action. The states, this Court has now decided, have power to enforce regulations regarding violence and physical force both through the traditional methods of the criminal and civil law and through their labor relations statutes.[34] Their inability to regulate the use of purely economic weapons against employers and, contrariwise, to protect the rights of employees and unions, will, to be sure, prevent states which have labor policies approximating the national policy from effectuating such policies. It will also, on the other hand, prevent states whose labor policies consist simply of restrictions against unions, without any counterbalancing rights, from enforcing those policies. In such states the absence of any control is far preferable to the imposition of regulations which fly in the face of the national policy.

Moreover, we do not necessarily discount the power of the Board to do what it has not yet attempted to do—give specific content for the purpose of this statute, by regulation or otherwise, to the broad term "affecting commerce" so as to fix with some precision the limits of the Act's coverage and make a serious effort to obtain the funds necessary to administer the included area. The Board has not attempted this so far. Instead it has explicitly refused to process cases which are clearly within the confines of its statutory jurisdiction.

We have assumed throughout that the Board has power so to proceed. We wish to make it clear that this assumption is for purposes of argument only. We think there is a serious question as to whether the Board can use its undoubted discretionary powers to proceed under Section 10 as a method of implementing a policy directly contrary to the Congressional mandate that jurisdiction can be ceded to the states only by cession agreements conforming to the requirements of Section 10(a). We think there is an even more

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[34] *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266 (1956).

serious question as to whether the Board does not violate Section 9(c)—which says that the Board "shall" conduct elections when it finds that a question of representation affecting commerce exists—when it deliberately refuses to conduct such elections even though it concedes that a question of representation affecting commerce does exist. We think, finally, that there is real doubt whether the Board had the right to ignore the Administrative Procedure Act in adopting the new standards. The standards were adopted *in camera* on the basis of a secret staff study, announced in a press release, and then applied to cases in which the question of jurisdiction had not been briefed or argued.

The present cases do not present the question of whether the Board has or has not exceeded its statutory powers But a decision of this Court that the objectives sought to be accomplished by the Board—the transfer of jurisdiction to the states—cannot be accomplished may go far toward avoiding the necessity of such a decision. For if those objectives are not realized we may at least hope that the Board will not persist in its present course.

Respectfully submitted,

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APPENDIX A

(Note: We reprint below the full text of the Board decision in *Star Garter Co.*, 114 NLRB 957 (1955). This decision does not represent any new, controversial or even significant application of the Board's 1954 standards. It was little noticed when decided and will undoubtedly be little noticed hereafter. We reprint it here because we believe that only by experiencing the full text of a Board decision under its new standards can the complexity of those standards be fully appreciated.

Star Garter is, of course, not typical of every Board decision under the 1954 standards. We are reasonably sure, however, that it does fairly represent the kind of reasoning which is often involved in the application of those standards. And we are completely confident that it would have been the most unlikely kind of coincidence if a state court, whose jurisdiction had been invoked prior to the Board decision, would have come up with the same kind of an answer as the Board ultimately gave.

Star Garter Company And Local 444, United Textile Workers Of America, AFL, Petitioner. Case No. 13-RC-4222. November 10, 1955

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, hearings were held before Albert Kleen, hearing officer. The hearing officer's rulings made at the hearings are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, for the following reasons:

The Employer is an Illinois corporation engaged in the manufacture and sale of infants' and women's wear, with its sole place of business in Chicago, Illinois. Its total sales during the calendar year 1954 amounted to $137,521. During the same period, its purchases totaled $68,862, of which about 80 percent was received directly from points outside the State of Illinois.

During this period out-of-State sales totaled $22,665, of which $2,401 went to unidentified customers and $20,254 were in shipments to Sears Roebuck stores located in other States. All remaining sales were shipments to purchasers located in the State of Illinois. To local customers whose annual out-of-State shipments fell short of $50,000, sales totaled $6,284. To Illinois customers—nonretail enterprises—each of whose direct out-of-State shipments exceeded $50,000, sales totaled $30,459. To the Illinois warehouse of Spiegel's, Inc., passingly referred to in the record as a mail-order house, sales amounted to $58,667. And to Sears Roebuck in Illinois, sales totaled $20,254, one-half to its warehouse and one-half to its local retail stores.

On the record before us, it does not appear that the Employer's operations meet any one of the minimum requirements set out in the Board's established standards for assertion of jurisdiction.

Direct out-of-State shipments of about $22,000 fall short of the $50,000 standard.[1] Because the Employer's products are all finished goods redistributed by its customers either by wholesale or retail sale, they are directly utilized in the customer's services; therefore, such sales properly falling in the indirect outflow category must equal at least $100,000 annually to establish a basis for assertion of jurisdiction.[2] It is clear that the sales to local nonretail enterprises who annually themselves ship over $50,000 outside the State constitute indirect outflow. This is so because the Board would assert jurisdiction over them on the basis of their own direct outflow. As to the within-the-State shipments made to Spiegel's, Inc., and to Sears Roebuck, both retail enterprises, such sales may or may not constitute indirect outflow depending upon whether the particular stores or units of such enterprises, which directly receive the Employer's products, themselves individually make annual shipments of $100,000 out of the State. This is so because the Board would not assert jurisdiction over these stores or consumer outlets on the basis of their direct outflow if their out-of-State shipments were below $100,000.[3] The fact that the Board might also take jurisdiction over such individual stores as integral parts of sufficiently large multistate chains or on

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[1] *Jonesboro Grain Drying Cooperative*, 110 NLRB 481.
[2] *Ibid.*
[3] *Hogue and Knott Supermarkets*, 110 NLRB 543.

the basis of direct or indirect inflow is immaterial here. The indirect outflow concept in our jurisdictional standards is grounded on the assumption of some form of continued outflow directly into the stream of interstate commerce.[4] On this point, the record shows only a stipulation of the parties that sales totaling $78,920 were made to within-the-State retail enterprises each of whom in turn makes out-of-State sales of over $100,000 annually.[5] It was not shown that any of these sales were to individual stores or units of such enterprises which themselves separately have sufficient direct outflow. We therefore cannot properly consider these sales as indirect outflow of the Employer.

In sum, so far as it appears, the Employer's direct outflow equals $22,665 and indirect outflow equals $30,459. Neither separately nor together do these figures satisfy the minimum established standards. No other basis for assertion of jurisdiction having been shown, we shall dismiss the petition.

(The Board dismissed the petition)

Member Murdock took no part in the consideration of the above Decision and Order.

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[4] *New Jersey Poultry & Egg Cooperative Association, Inc.*, 114 NLRB 536.

[5] Apparently, the parties reached this figure by adding the $58,667 sales to Spiegel's Inc., and the $20,254 sales to the stores and warehouse of Sears Roebuck, all in the State of Illinois.

APPENDIX B

(Note: We reprint below, for the Court's convenience, the summary of the Board's 1954 jurisdictional standards contained in the Board's Nineteenth Annual Report, for the fiscal year ending June 30, 1954, which was transmitted on January 4, 1955. The standards were actually announced in press releases on July 1 and July 15, 1954, and made immediately applicable but were not "explicated" in individual case opinions until *Breeding Transfer Co.*, 110 NLRB 493, (see Murdock, dissenting, at p. 501) on October 26, 1954.

The summary reprinted below does not completely accord with standards as announced in the press releases (the second of which is reprinted as Appendix B to the brief of respondent in the *Fairlawn* case, No. 41) because it includes revisions and modifications contained in cases decided later, such as *Bickford's, Inc.*, 110 NLRB 1904. As far as we can determine, the latest case included in the summary is *F. M. Reeves and Sons, Inc.*, 111 NLRB 186 (January 11, 1955). No later resume of the Board's standards is available as far as we know. Since the standards were not adopted as rules and regulations subject to the Administrative Procedure Act, 5 U.S.C. §§ 1002-1003, they have not been published in the Federal Register.)

The majority stated the new standards involved in the cases decided as follows:

We have determined that in the future cases the Board will assert jurisdiction—

1. [General Standards for Other-Than-Retail Establishments:] over enterprises which annually meet one or more of the following standards:

(1) *Direct inflow standard:*

An enterprise which receives goods or materials from out of State, valued at $500,000 or more.

(2) *Direct outflow standard:*

An enterprise which produces or handles goods and ships such goods out of State, or performs services outside the State in which the enterprise is located, valued at $50,000 or more,

The enterprise itself must actually ship the goods to the out-of-State destination.[22]

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[22] *Mast Lumber Co.*, 111 NLRB No. 2; compare *Homer Chevrolet Co.*, 110 NLRB No. 133.

(3) *Indirect inflow standard:*

An enterprise which receives goods or materials from other enterprises in the same State which those other enterprises received from out of State, valued at $1,000,000 or more.

However, the goods must be received by the ultimate purchaser in the form in which they entered the State.[2b]

(4) *Indirect outflow standard:*

An enterprise which furnishes goods or services to other enterprises coming within subparagraph (2), above, or to public utilities or transit systems, or instrumentalities or channels of commerce and their essential links, which meet the jurisdictional standards established for such enterprises; *and*

(a) Such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at $100,000 or more; [2c] *or*

(b) Such goods or services, regardless of their use, are valued $200,000 or more.

(5) *Multistate standard:*

An establishment other than retail which is operated as an integral part of a multistate enterprise; and

(a) The particular establishment involved meets any of the foregoing standards; *or*

(b) The direct outflow of the entire enterprise amounts to $250,000 or more; *or*

(c) The indirect outflow of the entire enterprise amounts to $1,000,000 or more.

We have further determined that unless an employer's volume of operations meets one of the Board's new independent jurisdictional standards, we will not accumulate those standards in order to assert jurisdiction.[3]

[2b] *Kenneth Chevrolet Co.*, 110 NLRB No. 241.

[2c] See *Pyne Moulding Corp.*, 110 NLRB No. 240, and *Eagle Iron and Brass Co.*, 110 NLRB No. 123; see also *Imperial Rice Mills, Inc.*, 110 NLRB No. 87; compare *G. C. McBride Co.*, 110 NLRB No. 198, declining jurisdiction over a quarry furnishing rock to an interstate railroad because the rock was not "directly utilized" in the operation of the railroad; and *F. M. Reeves and Sons, Inc.*, 111 NLRB No. 25, declining jurisdiction over a concern furnishing materials to a road construction firm since materials were not "directly utilized" in the operational or functional use of the roads.

[3] *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67. See *Rogers Bros. Wholesalers*, 110 NLRB No. 75.

However, direct and indirect inflow may be added in applying the indirect inflow standard.[3a]

2. [Intrastate Links of Interstate Commerce:] over transportation operations or other local activities which constitute a link in the chain of interstate commerce only where the annual income received by the particular company involved from services which constitute a part of interstate commerce totals no less than $100,000.[4]

It was further announced that jurisdiction will be asserted over (1) intrastate transit companies receiving at least $100,000 annually as a link in interstate transportation of passengers; and (2) over transit companies operating partly or wholly interstate and deriving at least $100,000 annually from (a) interstate operations or (b) from combined intrastate link transportation of passengers and interstate operations.[4a]

(3) [Concerns Doing National Defense Business:] enterprises of this type only if they are engaged in providing goods or services directly related to national defense pursuant to Government contracts, including subcontracts, in the amount of $100,000 or more a year.[5]

(4) [Retailing Concerns:] a company operating a single retail store or service establishment only where the store—

(1) has made annual purchases directly from out of state of at least $1,000,000 in value (direct inflow), *or*

(2) has made annual purchases indirectly from out of State of at least $2,000,000 in value (indirect inflow),[5a] *or*

(3) has made annual sales directly out of State of at least $100,000 in value (direct outflow).

As to *intrastate chains* of retail stores and service establishments we shall continue the practice of totaling direct inflow,

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[3a] *The Brass Rail, Inc.*, 110 NLRB No. 255.

[4] *Breeding Transfer Co., supra.*

[4a] *Rollo Transit Corporation*, 110 NLRB No. 228; see also *Republic Transport Co.*, 110 NLRB No. 247; compare *Edelen Transfer and Storage Co.*, 110 NLRB No. 230; and *Highway Services, Inc.*, 110 NLRB No. 66.

[5] *Maytag Aircraft Corp.*, 110 NLRB No. 70. See also *Ready Mixed Concrete Co.*, 110 NLRB No. 202 (jurisdiction asserted over seller of ready-mixed concrete for construction work at Air Force base); *Massachusetts Institute of Technology (Lincoln Laboratory)*, 110 NLRB No. 232 (jurisdiction asserted over laboratory engaged in research for defense); *Union Cab Co.*, 110 NLRB No. 259 (jurisdiction declined over taxicab company servicing Air Force reservation).

[5a] See, for example, *The Jefferson Co.*, 110 NLRB No. 113.

indirect inflow, or direct outflow of all stores in the chain to determine whether any one of these standards is met. If the totals satisfy any one of these standards, we will assert jurisdiction over the entire chain or over any store or group of stores in it as in the past.[6]

5. [Multistate Retail Chains:] in future cases involving a *multistate* chain of retail stores or service establishments we will assert jurisdiction over the entire chain or any integral part of it if the annual gross sales of all stores or establishments in the chain amount to at least $10,000,000. Otherwise we will assert jurisdiction only over those individual stores or establishments comprising integral parts of the chain which independently satisfy the inflow or outflow standards set forth above.[7]

6. [Franchise Dealers:] the Board will no longer use the "franchise yardstick" for purposes of asserting jurisdiction over automobile dealers or over distributors, wholesale or retail, in any other industry. . . . [W]here . . . a local retail establishment has a franchise agreement with a multistate enterprise the Board will apply the same jurisdictional standards as are applied to other local retail establishments.[8]

7. [Office Buildings:] over an office building operation only when the employer which owns or leases and which operates the office building is itself otherwise engaged in interstate commerce and also utilizes the building primarily to house its own offices.[9]

8. [Utilities and Transit Systems:] over local public utility and transit systems affecting commerce whose gross value of business is $3,000,000 or more per annum.[10]

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[6] *Hogue and Knott Supermarkets*, 110 NLRB No. 68.

[7] *Hogue and Knott Supermarkets, supra.* See also *Liggett Drug Co.*, 110 NLRB No. 157 (jurisdiction asserted); compare *Claffey's Beauty Shoppes*, 110 NLRB No. 97, and *Felsway Shoe Corp.*, 110 NLRB No. 238 (jurisdiction declined).

[8] *Wilson-Oldsmobile*, 110 NLRB No. 74. See also *Homer Chevrolet Co.*, 110 NLRB No. 133; *Grand River Chevrolet Co.*, 110 NLRB No. 98; *Coca-Cola Bottling Co. of San Angelo*, 110 NLRB No. 106.

[9] *McKinney Avenue Realty Co.*, 110 NLRB No. 69; *American Republics Corp.*, 110 NLRB No. 141.

[10] *Greenwich Gas Co.*, 110 NLRB No. 91. See also *Brooklyn Borough Gas Co.*, 110 NLRB No. 11; compare *Southwest Mississippi Electric Power Assn.*, 110 NLRB No. 245, and *Cascade Natural Gas Corp.*, 110 NLRB No. 154 (jurisdiction declined).

Rural electric cooperatives are considered analogous to local public utilities. *Clay Electric Cooperative, Inc.*, 111 NLRB No. 24.

9. [Newspapers:] over newspaper companies which hold membership in or subscribe to interstate news services, or publish syndicated features, or advertise nationally sold products, if the gross value of business of the particular enterprise involved amounts to $500,000 or more per annum.[11]

10. [Taxicabs:] we shall refuse to assert jurisdiction over taxicab companies. . . .[12]

11. [Associations of Employers:] we will adhere to our past practice of considering all association members who participate in multiemployer bargaining as a single employer for jurisdictional purposes. Accordingly, under the new standards, in determining whether to assert jurisdiction, the Board will continue to consider the totality of the operations of the Association members.[13]

The Board announced that it would press compliance with its orders issued under its old standards involving companies which would not come within Board jurisdiction under the new standards.[14]

Subsequent announcements added new standards and indicated areas to which the application of previously announced standards will be extended. Thus, jurisdiction will be asserted

12. [Communications Concerns:] over radio and television stations, and telephone and telegraph systems if the annual gross income of the enterprise amounts to at least $200,000.[14a]

13. [Restaurants:] over restaurants on the basis of the standards established for retail stores.[14b]

14. [Business in the Territories:] as to business enterprises in the Territories, it was announced that special standards established for particular types of businesses will be applied in the Territories.[14c]

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[11] *The Daily Press, Inc.*, 110 NLRB No. 95.

[12] *Checker Cab Co.*, 110 NLRB No. 109, Members Murdock and Petersen dissenting separately.

[13] *Insulation Contractors of Southern California, Inc.*, 110 NLRB No. 105, Member Murdock concurring separately.

[14] *Coca-Cola Bottling Company of Stockton*, 110 NLRB No. 134, Member Murdock concurring separately; Member Rodgers dissenting.

[14a] *Hanford Broadcasting Co. (KINGS)*, 110 NLRB No. 208; *Arkansas Airways Co.*, 110 NLRB No. 229.

[14b] *Bickford's Inc.*, 110 NLRB No. 252. See also *Greyhound Post Houses, Inc.*, 110 NLRB No. 253; *The Brass Rail, Inc.*, 110 NLRB No. 255; and *International Idlewild Catering Corp.*, 110 NLRB No. 257.

[14c] *Sixto Ortega*, 110 NLRB No. 251 (retail bakery); *South P. R. Broadcasting Corp (WISO)*, 111 NLRB No. 45 (radio station); *Union Cab Co.*, 110 NLRB No. 259 (Alaska taxicab company); compare *The Virgin Isles Hotel, Inc.*, 110 NLRB No. 65.